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11 UNITED STATES DISTRICT COURT  
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA, ) CR NO. 08-582-GW  
 14 )  
 Plaintiff, )  
 15 )  
 v. ) GOVERNMENT'S TRIAL MEMORANDUM  
 16 )  
 LORI DREW, )  
 17 ) Trial Date: November 18, 2008  
 Defendant. ) Time: 8:30 a.m.  
 18 ) Honorable George Wu  
 )

19  
 20 Plaintiff United States of America, by and through its  
 21 counsel of record, United States Attorney Thomas P. O'Brien and  
 22 Assistant United States Attorney Mark C. Krause, respectfully  
 23 files its trial memorandum in the above-entitled matter.

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1 I. FACTUAL SUMMARY OF GOVERNMENT'S CASE

2 A. BACKGROUND ON MYSPACE.COM

3 MySpace is a social networking website; that is, MySpace is  
4 a website that focuses on building online communities of people  
5 who share interests and activities, or who are interested in  
6 exploring the interests and activities of others. MySpace  
7 accounts are free. There are two types of users of the website:  
8 visitors and members. Visitors can navigate to the website and  
9 view certain content that is publically available. Members have  
10 greater rights of access. Not only can members view the  
11 publically available content, they also can view some content  
12 that is not available to nonmembers. They also are permitted to  
13 create unique personal profiles online. These profiles can  
14 include text, pictures, and audio files. Members also can find  
15 and communicate with old and new friends using MySpace  
16 communication services, including email and instant messaging  
17 services. Some content on MySpace is only available to MySpace  
18 members and only MySpace members have access to MySpace  
19 communication services.

20 Although MySpace membership is free, prospective members are  
21 required to agree to certain Terms of Service ("TOS") before they  
22 can become members. Prospective members are "authorized" to use  
23 MySpace's services only if they agree to abide by all applicable  
24 laws and the TOS. ("You are only authorized to use the Services  
25 . . . if you agree to abide by all applicable laws and to this  
26 Agreement"). The TOS also enumerate certain conduct that is not

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1 permitted on the website, is unauthorized, and can lead to  
2 termination of the member's account. Among other things, the  
3 rules prohibit:

- 4 1. "criminal or tortious activity, including child  
5 pornography, fraud, trafficking in obscene  
6 material, drug dealing, gambling, harassment,  
7 stalking, spamming, spimming, sending of viruses  
8 or other harmful files, copyright infringement,  
9 patent infringement or theft of trade secrets"
- 10 2. "using any information obtained from [MySpace  
11 services] in order to harass, abuse, or harm  
12 another person"
- 13 3. "soliciting personal information from anyone under  
14 18"
- 15 4. "harass[ing] or advocat[ing] harassment of another  
16 person."
- 17 5. promot[ing] information that the member knows is  
18 false or misleading; and
- 19 6. using a photograph with out a person's consent.

20 The registration process and TOS also require prospective members  
21 to promise that their registration information is truthful and  
22 accurate.

23 B. DEFENDANT EMBARKS ON SCHEME TO OBTAIN INFORMATION ABOUT  
24 M.T.M.

25 For several years, defendant's family and another local  
26 neighborhood family, the Meiers, were friendly. Each family had  
27 a daughter the same age. The two attended school together and  
28 were friends; however, their relationship was, at times, rocky.  
M.T.M. spent a great deal of time at defendant's residence and  
even traveled with defendant's family. During one such trip,  
defendant administered M.T.M. her prescription medications. On  
other occasions, M.T.M. feuded with defendant's daughter. In

1 addition, at times M.T.M. would act out and defendant would send  
2 her home, telling M.T.M. that she needed to take her medication.

3 Over time, the two girls drifted apart and, in 2005, the  
4 Meiers decided to transfer M.T.M. from the local public school to  
5 a local Catholic school. Christina Meier, M.T.M.'s mother  
6 confided in defendant that she was concerned about M.T.M.'s  
7 mental health and believed M.T.M. was particularly vulnerable.  
8 Specifically, Meier told defendant that M.T.M. was suffering from  
9 depression -- so much so that Meier expressed concern that the  
10 Meiers would need to reverse the locks on the door to M.T.M.'s  
11 bedroom so that she could not lock herself in and harm herself.  
12 Meier also told defendant that M.T.M. would become distraught  
13 when defendant would speak harshly to her and send her home.

14 Over the summer of 2006, defendant and her family became  
15 concerned that M.T.M. was spreading malicious rumors about  
16 defendant's daughter. Defendant discussed the matter with her  
17 daughter and her eighteen year old employee, Ashley Grills. The  
18 three conceived of a scheme where they would pretend to be an  
19 attractive male teenager on MySpace and approach M.T.M. through  
20 MySpace using that false identity to obtain M.T.M.'s confidence.  
21 Once they had gained M.T.M.'s confidence, the co-conspirators  
22 planned to find out what M.T.M. was saying on MySpace, including  
23 what M.T.M. was saying about defendant's daughter. Grills  
24 pointed out that there was a risk they would get in trouble if  
25 the scheme were uncovered; however, defendant assured Grills that  
26 they would not and, in any event, many people created fake

1 identities on the Internet.

2 C. DEFENDANT AND HER CO-CONSPIRATORS USE THE FAKE MYSPACE  
3 ACCOUNT

4 On September 20, 2008, defendant and her co-schemers created  
5 a MySpace profile under the fake name "Josh Evans." "Evans" was  
6 supposedly a teenager who was new to the area and was home-  
7 schooled. "Evans" was supposedly lonely because he did not know  
8 anyone in the area and "his" father had abandoned the family.  
9 The co-schemers also posted a photograph of an attractive boy on  
10 the profile to further the fraud.<sup>1</sup> On that same date, defendant  
11 and her co-schemers contacted M.T.M. through the MySpace  
12 communication services.<sup>2</sup> Smitten with the attractive "boy's"  
13 invitation to communicate, M.T.M. agreed to communicate with  
14 "him."

15 Although the initial communications were innocent enough,  
16 within days, defendant encouraged her co-schemers to flirt with  
17 M.T.M. Defendant also discussed using the information obtained  
18 during the scheme to humiliate M.T.M. in the real world.  
19 Specifically, when it became clear from the communications that  
20 M.T.M. was attracted to "Josh Evans," defendant proposed that the  
21 co-conspirators lure M.T.M. to a mall where they would reveal  
22 that there was no "Josh Evans" and taunt M.T.M. with the contents

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23  
24 <sup>1</sup> The co-conspirators did not ask anyone's permission before  
posting the photograph.

25 <sup>2</sup> Because M.T.M. registered for a juvenile account, that is,  
26 an account for members under the age of sixteen, her account was  
designated "private." As a result, the content on her page was  
27 not available to the public at large and could only be viewed if  
M.T.M. agreed to let the member contact her.



1 instructed her to "keep her mouth shut," to "stay off the  
2 MySpace," and to avoid accessing the Josh Evans account. Sensing  
3 something was amiss because defendant never called her daughter  
4 directly, the mother of the neighborhood girl, Michelle Mulford,  
5 asked her daughter what had happened. After speaking with her  
6 daughter, Mulford subsequently confronted defendant. Defendant  
7 told Mulford that she (defendant), her daughter, and Grills had  
8 created the account to play a prank on M.T.M. and that she  
9 (defendant) caused the account to be deleted. In a subsequent  
10 phone conversation, defendant tried to disclaim responsibility,  
11 telling Mulford that M.T.M. previously tried to commit suicide.

12 Likewise, a few days after the death, defendant told a  
13 friend that that she was afraid that the death had something to  
14 do with the MySpace profile they created and that, as a result,  
15 she deleted the evidence from her computer and just wanted it all  
16 gone. She nonetheless acknowledged that she was trying to get  
17 information from M.T.M.

18 D. DEFENDANT ACKNOWLEDGES INVOLVEMENT IN SCHEME TO LAW  
19 ENFORCEMENT

20 On November 25, 2006, defendant contacted the St. Charles  
21 Sheriff's Department to notify them about a neighborhood dispute.  
22 Defendant told the responding deputy that she needed to confront  
23 her neighbors, the Meiers, regarding their daughter's suicide.  
24 She went on to explain that she wanted to "just tell them" what  
25 she did to contribute to M.T.M.'s suicide. In particular,  
26 defendant stated that she instigated and monitored a MySpace  
27 account belonging to a "good looking" male for the sole purpose

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1 of communicating with M.T.M. to find out what M.T.M. was saying  
2 on-line. Defendant stated that the communications with M.T.M.  
3 were aimed at gaining her confidence to find out what she was  
4 saying about defendant's daughter and other people. Defendant  
5 stated that she, her daughter and Grills typed, read and  
6 monitored the communication between fake male profile and M.T.M.  
7 and that the conversation became sexual for a 13-year old. She  
8 also pointed out that she did not feel as guilty as she felt  
9 before once she found out M.T.M. had previously tried to commit  
10 suicide. She explained that she wanted the tension in the  
11 neighborhood documented in case their property was damaged in the  
12 future.

## 13 II. LEGAL AND EVIDENTIARY ISSUES

### 14 A. CONSPIRACY: 18 U.S.C. § 371

#### 15 1. Elements

16 In order for a defendant to be found guilty of conspiracy,  
17 in violation of 18 U.S.C. § 371, the government must prove:

18 (1) there was an agreement between two or more persons to commit  
19 at least one crime as charged in the indictment; (2) the  
20 defendant became a member of the conspiracy knowing of at least  
21 one of its objects and intending to help accomplish it; and  
22 (3) one of the members of the conspiracy performed at least one  
23 overt act for the purpose of carrying out the conspiracy.

#### 24 2. The Agreement

25 "[T]he evidentiary requirement for establishment of an  
26 agreement in the conspiracy context is considerably more lax than  
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1 in the case of an enforceable contract." United States v.  
2 Melchor-Lopez, 627 F.2d 886, 890 (9th Cir. 1980). To support a  
3 conspiracy conviction, "[t]he agreement need not be explicit; it  
4 may be inferred from the defendant's acts pursuant to a  
5 fraudulent scheme or from other circumstantial evidence." United  
6 States v. Cloud, 872 F.2d 846, 852 (9th Cir. 1989). Its  
7 existence may be inferred from evidence of a "concert of action,  
8 all the parties working together understandingly, with a single  
9 design for the accomplishment of a common purpose." United  
10 States v. Hubbard, 96 F.3d 1223, 1226 (9th Cir. 1996). "A  
11 conspiracy may exist even if a conspirator does not agree to  
12 commit each and every part of the substantive offense." Salinas  
13 v. United States, 522 U.S. 52, 63 (1977).

### 14 3. Overt Acts

15 The overt act "need not be of itself a criminal act; still  
16 less need it constitute the very crime that is the object of the  
17 conspiracy." United States v. Rabinowich, 238 U.S. 78, 86  
18 (1915). "Nor need it appear that all the coconspirators joined  
19 in the overt act." Id. The government need prove only one of  
20 the overt acts charged in the indictment.

### 21 4. Proof of Conspiracy

22 \_\_\_\_\_ "The government does not have to present direct evidence.  
23 Circumstantial evidence and the inferences drawn from that  
24 evidence will sustain a conspiracy conviction." United States v.  
25 Castro, 972 F.2d 1107, 1110 (9th Cir. 1992) (original emphasis),  
26 overruled on other grounds, United States v. Jimenez-Recio, 537

1 U.S. 270 (2003).

2 B. UNAUTHORIZED ACCESS TO A PROTECTED COMPUTER

3 1. Elements

4 In order for a defendant to be found guilty of unauthorized  
5 access to a protected computer, in violation of 18 U.S.C.  
6 § 1030(a)(2)(C), (b)(2)(C), the government must prove the  
7 following beyond a reasonable doubt: (1) the defendant  
8 intentionally accessed without authorization or exceeded  
9 authorized access to a computer; (2) the defendant's access of  
10 that computer involved an interstate or foreign communication;  
11 (3) by accessing without authorization or exceeding authorized  
12 access to that computer, the defendant obtained information from  
13 a computer used in interstate or foreign commerce or  
14 communication; and (4) the defendant obtained the information to  
15 further a tortious act.

16 2. Unauthorized Access

17 Unauthorized access is access that is "unapproved," "not  
18 permitted," and "not sanctioned" by the computer's owner. See  
19 Black's Law Dictionary 1559, 143 8th ed. (defining "unauthorized"  
20 as "done without authority" and "authorize" as "to give legal  
21 authority; to empower", "to formally approve"); Webster's New  
22 World Dictionary, 3d Collegiate Ed. 98 (1988) (defining  
23 "authorize" as "to give official approval to or permission for");  
24 [http://dictionary.reference.com /browse/authorized](http://dictionary.reference.com/browse/authorized) (defining  
25 "authorized" as "1. given or endowed with authority; 2. duly  
26 sanctioned").

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1 . . . laws . . . of any state" under 18 U.S.C.  
2 § 1030(c)(2)(B)(ii). Sattazahn v. Pennsylvania, 537 U.S. 101,  
3 111 (2003) ("Put simply, if the existence of any fact (other than  
4 a prior conviction) increases the maximum punishment that may be  
5 imposed on a defendant, that fact -- no matter how the State  
6 labels it --constitutes an element, and must be found by a jury  
7 beyond a reasonable doubt."). In enacting the provision,  
8 Congress explained that Section 1030(c)(2)(B)(ii) had the same  
9 meaning as identical language in 18 U.S.C. § 2511(1)(d) under the  
10 Wiretap Act. S. Rep. 104-357, 1996 WL 492169 at \*8 ("The terms .  
11 . . 'for the purpose of committing any criminal or tortious act'  
12 are taken from . . . the wiretap statute (18 U.S.C.  
13 § 2511(1)(d)), . . . and are intended to have the same meaning as  
14 in th[at] statute[)"). Because the language under 18 U.S.C.  
15 § 2511 is identical, Section 1030(c)(2)(B)(iii) should be  
16 construed in the same way. Nealon v. California Stevedore &  
17 Ballast Co., 996 F.2d 966, 970 (9th Cir. 1993) ("We would be  
18 frustrating the intent of Congress were we to interpret the  
19 provision in the Black Lung Act in a way that fulfills that  
20 purpose while, at the same time, interpreting the same language  
21 in the Longshore Act in exactly the opposite way.").  
22 Accordingly, the government must show "either (1) that the  
23 primary motivation, or (2) that a determinative factor in the  
24 actor's motivation for [the unauthorized access] was to commit a  
25 criminal [or] tortious act . . ." United States v. Dale, 991 F.2d  
26 819, 841-42 (D.C. Cir. 1993) (quoting United States v. Vest, 639

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1 F. Supp. 899, 904 (D. Mass. 1986), aff'd 913 F.F.2d 477 (1st Cir.  
2 1987). The tort at issue may be intentional infliction of  
3 emotional distress. See Doe v. Smith, 429 F.3d 706, 710 (7th  
4 Cir. 2005); Medical Laboratory Managment Consultants v. ABC, 1997  
5 WL 405908 (D. Ar. Mar. 27, 1997) .

6 The mere existence of a lawful purpose alone will not  
7 "sanitize" a defendant's conduct. Sussman v. ABC, 186 F.3d 1200,  
8 1202 (9th Cir. 1999) (lawful purpose cannot sanitize unlawful).  
9 The critical issue is the defendant's state of mind at the time  
10 of the unauthorized access. In re Doubleclick Inc. Privacy  
11 Litigation, 154 F. Supp. 2d 497 (S.D.N.Y. 2001) ("Section  
12 2511(2)(d)'s legislative history and caselaw make clear that the  
13 "criminal" or "tortious" purpose requirement is to be construed  
14 narrowly, covering only acts accompanied by a specific  
15 contemporary intention to commit a crime or tort."). Proof of  
16 M.T.M.'s death is evidence of defendant's intent. 1A O'Malley,  
17 Grenig & Lee, Federal Jury Practice and Instructions, p. 622, §  
18 17.07 (5th ed. 2000) ("You may infer, but you are certainly not  
19 required to infer, that a person intends the natural and probable  
20 consequences of acts knowingly done or knowingly omitted.").

21 6. Intentional Infliction of Emotional Distress

22 Intentional infliction of emotional distress requires:  
23 "(1) Extreme or outrageous conduct by the defendant with the  
24 intention of causing or reckless disregard of the probability of  
25 causing emotional distress; (2) The victim's suffering severe or  
26 extreme emotional distress; and (3) actual and proximate

1 causation of the emotional distress by the defendant's outrageous  
2 conduct. Hailey v. California Physicians Servs., 2007 WL 4472790  
3 (Cal. App. Dec. 4, 2007).

4 The conduct must be "so extreme as to exceed all bounds of  
5 that usually tolerated in a civilized society." Davidson v. City  
6 of Westminster, 32 Cal.3d 197, 209 (1982); see also Melorich  
7 Builders, Inc. v. Superior Court, 160 Cal. App. 3d 931, 935  
8 (1984). Mere "insults, indignities, threats, annoyances, petty  
9 oppressions, or other trivialities" are not "outrageous conduct"  
10 where the case is lacking in other circumstances of aggravation.  
11 Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 155  
12 (1987). Conduct not objectively "extreme and outrageous" may  
13 become so where the defendant proceeds in the face of knowledge  
14 that plaintiff is peculiarly susceptible to emotional distress by  
15 reason of age or some physical or mental condition or  
16 idiosyncrasy. KOVR-TV, v. Super. Ct., 31 Cal. App.4th 1023,  
17 1031-32 (1995). For example, a defendant's conduct can be  
18 extreme or outrageous where the victim is a child, id., or the  
19 defendant knows the victim suffers from a medical condition that  
20 makes them more vulnerable, Bundren v. Superior Court, 145 Cal.  
21 App. 3d 784, 791 (1983) (defendant knew victim feeling effects of  
22 surgery and had been attacked with machete). See also Alcorn v.  
23 Anbro Eng'g, Inc., 2 Cal.3d 493, 498 n.3 (1970) (special  
24 susceptibility to racial epithets); Fletcher v. W. Nat'l Life  
25 Ins. Co., 10 Cal. App. 3d 376, 404 (1970); Robinson v. Hewlett-  
26 Packard Corp., 183 Cal. App. 3d 1108, 1129-30 (1986). Likewise,

1 a defendant's conduct can be extreme or outrageous where the  
2 defendant is in a position or a relationship with the victim that  
3 would cause her conduct to have a particularly severe impact on  
4 the victim. Delia v. Torres, 134 Cal. App. 3d 471, 482 (1982)  
5 ("The jury reasonably could have found the abuse and manipulation  
6 a position of friendship, trust and influence in order to place  
7 the wife of a friend in a sufficiently vulnerable position to  
8 accomplish her rape was so extreme and outrageous as to caus  
9 severe emotional distress beyond that resulting from the rape  
10 itself."). Conduct that is intended to inflict emotional  
11 distress is more likely to be outrageous than conduct that is  
12 merely reckless. Davidson, 32 Cal.3d at 210.

13 C. LIABILITY OF A PRINCIPAL

14 Under 18 U.S.C. § 2, a person is punishable as a principal  
15 if that person aids and abets another person in the commission of  
16 an offense, or causes another person to commit an offense. A  
17 theory of aiding and abetting is implicit in every substantive  
18 count of an indictment. See United States v. Megna, 450 F.2d  
19 511, 512 (5th Cir. 1971). To establish guilt as an aider and  
20 abettor, the government must prove that: (1) the defendant  
21 knowingly associated with a criminal venture and (2) by his or  
22 her participation in that venture sought to make it succeed. See  
23 United States v. Vaccaro, 816 F.2d 443, 455 (9th Cir. 1987),  
24 disapproved on other grounds by United States v. Huddleston, 485  
25 U.S. 681 (1988); United States v. Vaughn, 797 F.2d 1485, 1492  
26 (9th Cir. 1986).



1 through cross examination of INS agent); United States v.  
2 Collicott, 92 F.3d 973, 983 (9th Cir. 1996) (hearsay not admitted  
3 regardless of Rule 106).

4 C. ADMISSIBILITY OF BUSINESS RECORDS UNDER FEDERAL RULE OF  
5 EVIDENCE 902(11)

6 Amended Rule 902 of the Federal Rules of Evidence provides  
7 that "extrinsic evidence of authenticity as a condition precedent  
8 to admissibility is not required with respect to the original or  
9 a duplicate of a domestic record of regularly conducted activity  
10 that would be admissible under Rule 803(6) if accompanied by a  
11 written declaration of its custodian or other qualified person."

12 The government has notified defendant of the government's intent  
13 to introduce evidence by way of Federal Rule of Evidence 902(11).

14 The Ninth Circuit has stated that the use of declarations to  
15 establish foundational facts does not violate Crawford v.

16 Washington, 541 U.S. 36 (2004). United States v. Cervantes-  
17 Flores, 421 F.3d 825, 834 (9th Cir. 2005); United States v.  
18 Weiland, 420 F.3d 1062, 1077 (9th Cir. 2005).

19 D. STATEMENTS BY CO-CONSPIRATORS NOT HEARSAY

20 A statement is not hearsay if it is "a statement by a co-  
21 conspirator of a party during the course and in furtherance of  
22 the conspiracy." Fed. R. Evid. 801(d)(2)(E).

23 1. Foundation

24 For a statement to be admissible under Rule 801(d)(2)(E),  
25 the offering party must establish that: (a) the statement was in  
26 furtherance of the conspiracy; (b) it was made during the life of  
27 the conspiracy; and (c) the defendant and declarant were members

1 of the conspiracy. Bourjaily v. United States, 483 U.S. 171, 175  
2 (1987); United v. Smith, 893 F.2d 1573, 1578 (9th Cir. 1990).

3 The offering party has the burden of proving these foundational  
4 facts by a preponderance of the evidence. Bourjaily, 483 U.S. at  
5 176; United States v. Schmidt, 881 F.2d 608, 610 (9th Cir. 1989).  
6 Whether the offering party has met its burden is to be determined  
7 by the trial judge, and not the jury. United States v. Zavala-  
8 Serra, 853 F.2d 1512, 1514 (9th Cir. 1988). The contents of the  
9 declaration, together with independent evidence, may constitute  
10 sufficient proof of the existence of the conspiracy and the  
11 involvement of the defendant and declarant in it. Boujaily, 483  
12 U.S. at 181.

13 2. "In Furtherance of the Conspiracy"

14 The term "in furtherance of the conspiracy" is construed  
15 broadly to include statements made to "induce enlistment or  
16 further participation in the group's activities," to "prompt  
17 further action on the part of conspirators," to "reassure members  
18 of a conspiracy's continued existence," to "allay a co-  
19 conspirator's fears," or to "keep co-conspirators abreast of an  
20 ongoing conspiracy's activities." United States v. Yarbrough,  
21 852 F.2d 1522, 1535-36 (9th Cir. 1988).

22 A co-conspirator declaration need not have been made  
23 exclusively, or even primarily, to further the conspiracy.  
24 Garlington v. O'Leary, 879 F.2d 277, 284 (1989). Likewise,  
25 statements made with the intent of furthering the conspiracy are  
26 admissible whether or not they actually result in any benefit to  
27

1 the conspiracy. United States v. Williams, 989 F.2d 1061, 1068  
2 (9th Cir. 1993); United States v. Schmidt, 881 F.2d 608, 612 (9th  
3 Cir. 1989). Nor is it necessary that the defendant was present  
4 at the time the statement was made. Sendejas v. United States,  
5 428 F.2d 1040, 1045 (9th Cir. 1970). Finally, co-conspirator  
6 declarations need not be made to a member of the conspiracy to be  
7 admissible under Rule 810(d)(2)(E). United States v. Zavala-  
8 Serra, 853 F.2d 1512, 1516 (9th Cir. 1988).

9 3. Connection of Statement to Defendant

10 Once the existence of the conspiracy is established, only  
11 "slight evidence" is needed to connect the defendant and the  
12 declarant to it. United States v. Crespo De Llano, 838 F.2d  
13 1006, 1017 (9th Cir. 1987). The declaration itself, together  
14 with independent evidence, may constitute sufficient proof of the  
15 existence of the conspiracy and the involvement of the defendant  
16 and declarant in it. Bourjaily, 483 U.S. at 181; Zavala-Serra,  
17 8563 F.2d at 1515.

18 4. Laying the Foundation

19 The foundation for the admission of a co-conspirator  
20 statement may be established before or after the admission of the  
21 statement. See United States v. Loya, 807 F.2d 1483, 1490 (9th  
22 Cir. 1987). If a proper foundation has not yet been laid, the  
23 court may nevertheless admit the statement, but with an  
24 admonition that the testimony will be stricken should the  
25 conspiracy not be proved. See United States v. Kenny, 645 F.2d  
26 1323, 1333-34 (9th Cir. 1981).

1 E. CO-CONSPIRATOR STATEMENTS ARE NOT TESTIMONIAL

2 Co-conspirator statements are not "testimonial" and  
3 therefore are admissible under Crawford. See United States v.  
4 Rashid, 383 F.3d 769, 776 (8th Cir. 2004) ("co-conspirator  
5 statements are not testimonial for purpose of Crawford analysis);  
6 United States v. Saget, 377 F.3d 223, 224-25 (2d Cir. 2004) ("we  
7 hold that the introduction of Beckham's co-conspirators  
8 statements against Saget did not violate the Confrontation Clause  
9 because the statements were not testimonial, and therefore did  
10 not implicate the per se bar on the introduction of out-of-court  
11 testimonial statements, absent a prior opportunity for cross  
12 examination"); see also United States v. Holmes, 406 F.3d 337,  
13 349 (9th Cir. 2005) (even if statements are testimonial they do  
14 not violate Crawford if not offered for their truth).

15 F. CHAIN OF CUSTODY

16 The test of admissibility of physical objects connected with  
17 the commission of a crime requires a showing that the object is  
18 in substantially the same condition as when the crime was  
19 committed (or the object seized). Fed. R. Evid. 901(a). Rule  
20 901(a) of the Federal Rules of Evidence provides that "[t]he  
21 requirement of authentication or identification as a condition  
22 precedent to admissibility is satisfied by evidence sufficient to  
23 support a finding that the matter in question is what its  
24 proponent claims."

25 Rule 901(a) only requires the government to make a prima  
26 facie showing of authenticity or identification "so that a  
27

1 reasonable juror could find in favor of authenticity or  
2 identification." United States v. Chu Kong Yin, 935 F.2d 990,  
3 996 (9th Cir. 1991). Factors to be considered in the Court's  
4 determination include the nature of the article, the  
5 circumstances surrounding the preservation and custody of it, and  
6 the likelihood of intermeddlers tampering with it. Gallegos v.  
7 United States, 276 F.2d 914, 917 (9th Cir. 1960). The government  
8 is not required, in establishing chain of custody, to call all  
9 persons who may have come into contact with the piece of  
10 evidence. Reyes v. United States, 383 F.2d 734 (9th Cir. 1967);  
11 Gallegos, 276 F.2d at 917. Alleged gaps in a chain of custody go  
12 to the weight of the evidence, rather than its admissibility.  
13 See United States v. Matta-Ballesteros, 71 F.3d 754, 768-769 (9th  
14 Cir. 1995). To avoid defects in chain of custody, there must be  
15 a showing that the evidence is in substantially the same  
16 condition as when it was seized. See id.

17 When exhibits are at all times in official custody, a  
18 presumption of regularity attends the discharge of official  
19 duties. See United States v. Aviles, 623 F.2d 1192, 1198 (7th  
20 Cir. 1980). In short, the district court may admit physical  
21 evidence so long as there is a "reasonable probability the  
22 article has not been changed in important respects." Id.  
23 (citation omitted).

#### 24 G. Expert Testimony

25 The government intends to call three expert witnesses at  
26 trial and has disclosed all reports, qualifications, and  
27

1 summaries to defense.

2 1. Computer Forensics

3 The first expert witness, Det. Brian Mize, is an expert in  
4 computer forensics and performed an examination of defendant's  
5 computer as well as the computer belonging to the Meiers. The  
6 government also expects to call Special Agent Justin Kempf, an  
7 expert in computer forensics to testify about additional  
8 materials that he identified. Agent Kempf also may rebut claims  
9 made by Tami Loehrs, proffered by the defendant.

10 2. Psychiatric Testimony

11 The government also expects to call Dr. Said Khojeste, a  
12 expert in psychiatry, to testify about M.T.M.'s mental state and  
13 her medical condition prior to and during defendant's scheme.

14 H. Character Witnesses

15 The government anticipates defendant may call character  
16 witnesses. The Supreme Court has recognized that character  
17 evidence – particularly cumulative character evidence – has weak  
18 probative value and great potential to confuse the issues and  
19 prejudice the jury. Michelson v. United States, 335 U.S. 469,  
20 480, 486 (1948). The Court has thus given trial courts wide  
21 discretion to limit the presentation of character evidence. Id.  
22 at 486.

23 Rule 404(a) of the Federal Rules of Evidence governs the  
24 admissibility of character evidence. Rule 404(a) permits a  
25 defendant to introduce evidence of a "pertinent" trait of  
26 character. Because the charges here do not have a character  
27

1 trait as an element, the only "pertinent" traits of character in  
2 this case are defendant's status as a law-abiding citizen. See  
3 United States v. Camejo, 929 F.2d 610, 612-13 (11th Cir. 1991)  
4 (evidence of defendant's prior lawful conduct excluded as  
5 "inadmissible character evidence").

6       Moreover, the form of the proffered evidence must be proper.  
7 Federal Rule of Evidence 405(a) sets forth the sole methods by  
8 which character evidence may be introduced. It specifically  
9 states that where evidence of a character trait is admissible,  
10 proof may be made in two ways: (1) by testimony as to reputation;  
11 and (2) by testimony as to opinion. Thus, a defendant may not  
12 introduce specific instances of his good conduct through the  
13 testimony of others. Michelson, 335 U.S. at 477 ("The witness  
14 may not testify about defendant's specific acts or courses of  
15 conduct or his possession of a particular disposition or of  
16 benign mental or moral traits"); Camejo, 929 F.2d at 612-13  
17 (evidence of specific acts of good conduct inadmissible in  
18 narcotics case under Rule 405(a)).

19       On cross-examination of a defendant's character witness,  
20 however, the government may inquire into specific instances of a  
21 defendant's past conduct relevant to the character trait at  
22 issue. Fed. R. Evid. 405(a). The only prerequisite is that  
23 there be a good faith basis that the incidents inquired about are  
24 relevant to the character trait at issue. See United States v.  
25  
26  
27

1 McCollom, 664 F.2d 56, 58 (5th Cir. 1981); United States v.  
2 Bright, 588 F.2d 504 (5th Cir. 1979).

3 Dated: November \_\_\_\_, 2008

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