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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

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16 UNITED STATES OF AMERICA,) CASE NO. 17-CR-462-JSW
17 Plaintiff,)
18 v.) **GOVERNMENT’S TRIAL BRIEF**
19 JOB TORRES HERNANDEZ,) Honorable Jeffrey S. White
20 Defendant.) Pretrial Conference Date: January 28, 2019
21) Time: 2:00 p.m.
22)

23 **INTRODUCTION**

24 Trial in this matter is set for March 4, 2019. In the government’s motions in limine, which were
25 been filed separately with the Court, the government sought pretrial rulings on two specific evidentiary
26 issues. In this trial brief, the government address an additional issue that it believes will be important at
27 trial: the scope of admissible victim testimony on direct examination.
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FACTUAL BACKGROUND

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2 During the time period alleged in the indictment, defendant operated construction companies in
3 the Bay Area. From about May 2015 through about January 2016, one of defendant's companies
4 performed construction work in San Francisco as part of a contract with Marriott. From about February
5 2017 through about August 2017, one of defendant's companies performed construction work in San
6 Jose as part of a contract with Full Power Properties.

7 During this time, much of defendant's work force did not have legal status to work or live in the
8 United States. The government anticipates calling more than ten victims of defendant's offenses to
9 testify, each of whom worked for defendant and many of whom not have legal immigration status. The
10 government will elicit testimony from these victims about: how they began working for defendant; the
11 promises defendant made to them regarding wages and housing; the wages and housing they actually
12 received from defendant; the conditions in which they lived and the hours they worked; defendant's
13 statements regarding their immigration status; and defendant's statements and behaviors when they
14 confronted him about his failure to provide payment.

15 Several of these victims began working for defendant after responding to a work advertisement
16 that defendant posted in a Tijuana newspaper. After calling the number on the advertisement, the
17 victims were told to cross the border at San Ysidro in San Diego, California. After crossing the border,
18 an individual working for defendant picked up the victims and drove them to defendant's warehouse in
19 Hayward, California.

20 Once the workers arrived, defendant promised the victims certain wages and living
21 arrangements. Some victims describe that when they arrived, defendant also promised that he would
22 help them gain legal immigration status. Defendant then failed to follow through on these promises.
23 Some victims describe working for up to three months at a time without receiving any payment from
24 defendant. One victim describes receiving only \$8000 of payment for 18 months of full-time work, a
25 small percentage of both minimum wage and what he was promised. Another victim describes not
26 eating for three days because he had run out of money for food and defendant was not paying him.

27 A number of victims also describe the unsuitable living conditions in the warehouse where
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1 defendant housed them. Upwards of twenty workers at a time slept on makeshift beds in the attic of the
2 warehouse. The workers had access to a single, unsanitary bathroom. Often, this bathroom did not have
3 running water, and the victims had to collect water in a bucket to operate the toilet and to bathe. Victims
4 further describe not being allowed to leave the warehouse at night, noting that the warehouse was
5 sometimes locked from the outside. When confronted, defendant told victims that he would get in
6 trouble if authorities found out that the victims were living there. At one point, defendant threatened the
7 workers with harm should he find out that any of them were complaining about their working or living
8 conditions to authorities.

9 When one victim suffered a serious injury, defendant told him that he could not seek medical
10 treatment in the United States and sent him back to Mexico to receive treatment. Defendant then failed
11 to pay for the treatment.

12 When victims confronted defendant about payment, defendant responded in a manner that was
13 often dismissive, derogatory, and at times threatening. Defendant admonished victims about being
14 unappreciative of the opportunity he had given them. Other times, defendant threatened that if the
15 victims stopped working and left, they would never receive payment for the work they had done. On
16 one occasion, after local law enforcement conducted an inspection the warehouse, defendant announced
17 that all workers without immigration status would have to leave the warehouse and stay at a hotel.

18 The government also anticipates presenting testimony from law enforcement officers who
19 gathered evidence by conducting interviews, performing surveillance, taking photographs of working
20 and living conditions, and executing search warrants.

21 ARGUMENT

22 This Court should allow the government to elicit testimony from victims on the matters set forth
23 above. As set forth below, the proposed testimony as probative on both charged counts: (1) alien
24 harboring, in violation of 8 U.S.C. § 1324(a); and (2) forced labor, in violation of 18 U.S.C. § 1589.

25 To prove defendant guilty of the alien harboring offense, the government must show: that at least
26 one alien not lawfully in the United States was harbored; that defendant knew or was in reckless
27 disregard that at least one of his workers was an unlawful alien; that defendant harbored, concealed or
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1 shielded from detection at least one unlawful alien for the purpose of avoiding detection by immigration
2 authorities; and that defendant did so for commercial advantage or private financial gain. NINTH
3 CIRCUIT MODEL JURY INSTRUCTION 9.3.

4 To prove defendant guilty of the forced labor charge, the government must show that defendant
5 obtained the labor or services of at least one of the victims by any one of, or any combination of, the
6 following means: physical restraint and threats of force; threats of serious harm; abuse or threatened
7 abuse of law and legal process; or a scheme, plan, and pattern intended to cause his employees to believe
8 that if they did not perform such labor or services, they would suffer serious harm. 18 U.S.C. § 1589(a).
9 As the Ninth Circuit has explained,

10 someone is guilty of forced labor if he intends to cause a person in his employ to believe that if
11 she does not continue to work, she will suffer the type of serious harm – physical or nonphysical,
12 including psychological, financial, reputation harm – that would compel someone in her
circumstances to continue working to avoid that harm.

13 *United States v. Dann*, 652 F.3d 1160, 1169-70 (9th Cir. 2011).

14 Here, the victim testimony set forth above is probative on the elements of both charges.
15 Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be
16 without the evidence” and “the fact is of consequence in determining the action.” Fed. R. Evid. 401.
17 The government anticipates eliciting victim testimony that is probative on (1) each victim’s status as an
18 unlawful alien and defendant’s knowledge of the victim’s immigration status; (2) defendant’s harboring,
19 concealing, and shielding of the victims in the warehouse; (3) the commercial and financial benefits
20 defendant sought by paying the victims substantially less than he had promised them; (4) and the serious
21 harm reasonably feared by the victims if they did not continue to work for the defendant and do as he
22 instructed.

23 The government anticipates that many of the victims will testify that they crossed into the United
24 States on border crossing cards in order to work for the defendant. The border crossing cards only
25 legally enabled them to stay in a border town for tourist purposes. However, once the victims crossed
26 the border, defendant arranged for their transportation to Hayward to work for him. In addition, many of
27 the victims had conversations with defendant about their status; for example, defendant asked some to
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1 turn in their border crossing cards to him, defendant promised others that he would help them get legal
2 status, and defendant later ordered the workers without lawful status to leave the warehouse and go to a
3 hotel. This evidence is probative on the victims' immigration status and defendant's knowledge of it,
4 both of which are elements the government has to prove.

5 The victims' descriptions of warehouse living conditions are also probative on the charged
6 offenses. First, the warehouse conditions demonstrate literal concealment and shielding. Victims will
7 testify that they were not allowed to leave the warehouse at night, and that the warehouse was
8 sometimes locked from the outside. *See Dann*, 652 F.3d at 1174 (citing evidence that the defendant
9 "restricted [the victim's] movement and forbade her from speaking to anyone outside the home" as
10 evidence supporting the concealment prong of a charge under 8 U.S.C. § 1324). The poor warehouse
11 conditions are also probative on the manner in which defendant benefitted commercially and financially
12 by employing these workers. The resources that defendant did not expend on providing suitable living
13 conditions increased his potential profit margin in his construction work. This point is buttressed by
14 defendant's failure to pay wages. In other words, juxtaposing what defendant provided to his workers
15 here (poor living conditions, wages substantially less than minimum wage) with the employment
16 expenses that a lawful employer would incur reveals the commercial advantage that defendant sought
17 and obtained. As the Second Circuit explained in upholding a defendant's conviction under § 1324,

18 the record supports the jury's conclusion that Mr. McClellan intended to safeguard his
19 employees from the authorities. Like the defendant in *Campbell*, keeping his employees'
20 legal status "off the radar" was important to the profitable running of his business, *The*
21 *Paragon*. Indeed, the contract for the sale of the St. John Road house was negotiated
22 during the same time period as the purchase of *The Paragon*. The location of the home
23 minimized the illegal employees' exposure to the general public, and the free rent and
24 utilities both made their lower wages more attractive and prevented them from engaging
25 in other commercial transactions, which may have exposed their illegal status. There was
26 deliberate action on Mr. McClellan's part that made detection of the employees living at
27 the St. John Road house more difficult. Consequently, the elements of harboring under §
28 1324(a)(1)(A)(iii) are satisfied.

25 *United States v. McClellan*, 794 F.3d 743, 751 (7th Cir. 2015)

26 Finally, defendant's treatment of his workers is generally probative both on how he sought and
27 obtained a commercial advantage, in violation of 8 U.S.C. § 1324, and how he coercively secured labor,
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1 in violation of 18 U.S.C. § 1589. The government anticipates that victims will testify that defendant
2 threatened not to pay them at all if they left or did not listen to his orders, and further, that they felt they
3 had little legal recourse due to their lack of immigration status. Indeed, according to victims,
4 defendant often challenged workers to sue him and claimed that he was “untouchable.” When victims
5 would complain about a lack of pay, defendant would at times threaten them with deportation. Many of
6 the victims felt that their only prospect of ever getting paid was to continue to work for defendant.
7 Leaving the job, never receiving payment for the many months of work they had performed, and
8 returning to their families with no money in hand was simply not a tenable option. This combination of
9 financial, immigration, and other harms is probative of the forced labor charge. As the Court explained
10 in *Dann*,

11 We conclude that there was sufficient evidence for a reasonable juror to find that Dann
12 intended Peña Canal to believe that Peña Canal would suffer financial harm and that that
13 financial harm was “sufficiently serious” within the meaning of the statute. For an
14 immigrant without access to a bank account and not a dollar to her name, a juror could
15 conclude that the failure to pay her – and thus the lack of money to leave or live – was
16 sufficiently serious to compel Peña Canal to continue working.

17 ...

18 There was also evidence that Dann intended Peña Canal to fear immigration harm. As the
19 Seventh Circuit articulated in [*United States v.*] *Calimlim*, a victim has fewer means of
20 escape where the threats in her case involve immigration. 538 F.3d [706, 712 (7th Cir.
21 2008) (noting that the immigrant victim “did not have an exit option: because the threats
22 in her case involved her immigration status, she could not freely work for another
23 employer in order to escape the threatened harm.”).

24 652 F.3d at 1171-73 (discussing that a combination of financial harm, immigration harm, and other
25 harms was sufficient to support a conviction under 18 U.S.C. § 1589).

26 Because it is probative on both charged offenses, the government should be permitted to elicit
27 testimony from victims as set forth above.
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