UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. MILES GUO, *Defendant*.	**FILED PARTIALLY UNDER SEAL** Case No. 1:23-CR-118-1 (AT)

DEFENDANT HO WAN KWOK'S OPPOSITION TO THE GOVERNMENT'S RENEWED MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY

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Defendant Ho Wan Kwok respectfully submits this memorandum in opposition to the government's renewed motion to exclude or limit the testimony of Mr. Kwok's proposed expert witnesses (the "Govt. Mot." or the "Motion").[1] For the reasons set forth below, Mr. Kwok respectfully submits that the Court should deny the government's motion in its entirety.

PRELIMINARY STATEMENT

Under *Daubert*, the Court's role with respect to expert testimony is to play a limited gate-keeping function intended to prevent the jury from hearing obviously irrelevant or unreliable expert opinions. The Court's role is not to pick one side's version of events and preclude the other side's experts based on that version. That, however, is precisely what the government asks the Court to do. Under the guise of notice or reliability arguments, the government asks the Court to accept, for example, its view of the reliability of data, what information should or should not be considered by an expert, and the strength of an expert's credentials. That is not the law, however—those matters are commended to cross-examination and the jury's consideration. Accordingly, the government's motion should be denied.

First, the government's desire to preclude or limit all of Mr. Kwok's experts is understandable—their expert opinions squarely undercut a number of the government's core allegations. For example, Mr. Kwok's valuation expert, Raymond Dragon, will offer opinions that directly rebut the government's claim that Mr. Kwok's valuation of GTV was inflated, a key allegation for the government's Farm Loans and G|CLUBS-related counts. Maggie Sklar—Mr. Kwok's expert on cryptocurrency—will offer opinions that respond to the government's allegation that H-Coin and H-Dollar are not real cryptocurrencies, a foundation of the government's

[1] References to the "Pohlman Declaration" or "Pohlman Decl." are to the May 6, 2024 Declaration of Daniel Pohlman, submitted together with this memorandum. References to "Govt. Mot. Ex. __" are to the exhibits to the Motion.

Himalaya Exchange-related count. Mr. Kwok's forensic investigations expert, Thomas Bishop, will bolster Mr. Kwok's innocent explanations for why, for example, common bank accounts were used to receive and pay expenses related to both Mr. Kwok's personal lifestyle and the political movement, which is a core part of the government's Farm Loans and money laundering related proof. And finally, Paul Doran, Mr. Kwok's expert on the CCP's repressive tactics against dissidents, offers testimony that cuts across all the counts, by explaining, for example, why Mr. Kwok could reasonably believe GTV was valuable, why he and other movement members would want a secure location to meet like the Mahwah Facility, and why he would switch cellphones regularly or use multiple bank account. Mr. Kwok's proposed experts provide crucial evidence for his defense to all of the government's charges—in fact, the government essentially concedes the relevance of such expert testimony at multiple points in its motion.

Second, the government's complaints about Mr. Kwok's disclosures with respect to Mr. Dragon, Ms. Sklar, and Mr. Bishop or their methodology are not a proper basis for preclusion. With respect to each of these experts, Mr. Kwok has supplied more than what is required under Rule 16—he has specifically detailed the opinions they will offer and the "bases and reasons" for those opinions. The government's contention that it is left to guess about these experts' anticipated testimony is a manufactured complaint without merit. And, with respect to the government's arguments about the purported unreliability of these experts' methodology, those matters are classic cross-examination material, not a basis for preclusion.

Third, with respect to Mr. Doran, the government effectively concedes that he should be allowed to testify as to many of the opinions in his notice. To the extent the government does challenge any of Mr. Doran's anticipated testimony, it does so based on a standard that the government claims the Court imposed, but that, in reality, the government invented out of whole

cloth. But even applying that standard—namely that the testimony must show that Mr. Kwok's concerns about CCP targeting are not "mere paranoia"—all of Mr. Doran's testimony is appropriate. For example, there is no better evidence that Mr. Kwok had to take the CCP threat seriously than the fact that law enforcement in this country and others take the threat seriously. Accordingly, all of Mr. Doran's testimony is relevant and admissible, even under the government's manufactured heightened standard.

For the reasons set forth below, Mr. Kwok respectfully submits that the government's motion to preclude or limit his proffered expert testimony should be denied in its entirety.

ARGUMENT

I. THE JURY SHOULD HEAR AND CONSIDER MR. DRAGON'S PROPOSED TESTIMONY

A central allegation in the Superseding Indictment is the government's assertion that Mr. Kwok falsely promised that if the alleged victims participated in the loan program or purchased G|CLUBS memberships, they would receive GTV shares, and that in August 2020, Mr. Kwok falsely stated that the value of GTV was $2 billion. (Indictment ¶ 17(d), *see also id.* ¶ 39(e).) The government concedes that because of this allegation, "testimony on the actual value of the company may be appropriate, as it is, indeed, the province of an expert." (Gov. Mot. at 5.) Mr. Kwok offered Mr. Dragon, an expert in valuation issues, to testify on exactly this issue. The government has therefore conceded that Mr. Dragon's testimony is relevant to this case. Moreover, the government has not (and could not) challenge Mr. Dragon's qualifications to opine on valuation issues.

As a result, the government's only challenges to Mr. Dragon's disclosure are (i) that it has not received sufficient notice of Mr. Dragon's proposed testimony and (ii) that Mr. Dragon's

analysis is purportedly unreliable and would confuse the jury. The government is wrong on all counts, and its motion with respect to Mr. Dragon should be rejected.

A. Mr. Dragon's Expert Disclosures Give Sufficient Notice

The government claims that it is "difficult to discern" what opinions Mr. Dragon will offer and how he arrived at those conclusions. Whatever difficulty the government has in understanding Mr. Dragon's proposed testimony is not, however, due to a lack of detail in Mr. Dragon's disclosure. Mr. Dragon's expert notices supply everything that is required under Rule 16—the notices clearly lay out the opinions Mr. Dragon will offer, as well as the methodologies that he used to arrive at those opinions. Nothing more is required under the rule, and the government's supposed confusion is not a basis to exclude Mr. Dragon's testimony.

First, the government speculates that Mr. Dragon may opine about any number of outlandish topics, including that GTV was worth up to $10 billion. But there is no need to guess about Mr. Dragon's proposed opinions because they are spelled out clearly in his expert disclosures. Mr. Dragon will testify that he validated the assumptions and methodology of a valuation report prepared by the firm Alvarez & Marsal (the "A&M Report"), which, based on information available in August 2020, concluded that GTV could reasonably be valued at $2 billion. (*See* Govt. Ex. A at p. 3, ¶ 2.) He will further opine that he did not stop with his analysis of the A&M Report, but rather evaluated the GTV valuation under multiple industry standard valuation techniques. In particular, Mr. Dragon analyzed the company's discounted cash flow projections (the "Discounted Cash Flow of the Income Method"); measured GTV against comparable companies (the "Comparator Public-Traded Companies Method of the Market Approach"); and considered the amount of capital that was actually raised during the GTV Private Placement (the "Backsolve Method of the Market Approach"). (*See id*. at pp. 2-3, ¶¶ 1, 3.)

Based on his evaluation of the A&M Report and his supplemental analysis, Mr. Dragon will opine that "a $2 billion valuation for GTV was reasonable based on information available in August 2020." (*See id*. at p. 3, ¶ 3.) Finally, Mr. Dragon will offer a qualitative opinion that "when a company is the sole or dominant player in a market, that can increase the value of the company, and that specifically the censorship efforts of the CCP could create a niche market for GTV, which could further bolster the company's value." (*See id*. at p. 3, ¶ 4.) Thus, Mr. Dragon's supplemental notice clearly lays out the opinions to which he will testify, and the government's purported confusion about the scope of his expert testimony should be rejected.

Second, Mr. Dragon's supplemental notice clearly sets forth the "bases and reasons" for his opinions. As an initial matter, although the government essentially ignores it, Mr. Dragon's notice states clearly that he will be relying on his extensive experience in the valuation industry as a basis for his expert conclusions. Experts are permitted to rely on their experience in arriving at their opinions. *See McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995) (a witness' "background and practical experience" is sufficient to qualify them under *Daubert*); *see also S.E.C. v. U.S. Env't, Inc.*, No. 94 Civ. 6608 (PKL)(AJP), 2002 WL 31323832, at *3 (S.D.N.Y. Oct. 16, 2002) (expert's testimony was reliable where it was "based on his knowledge of typical trading activity and the types of trading patterns that an experienced trader would recognize as irregular, and as such, are supported by his 30 years of experience in the securities industry"). Moreover, while experts need not rely on anything more than their experience in arriving at their conclusions, Mr. Dragon's discussion of his analysis goes far beyond simply describing his experience. Rather, Mr. Dragon described the industry-standard valuation approaches that he is using, including by specifically explaining what each approach entailed. (*See* Govt. Mot. Ex. A at 2.)

Specifically, Mr. Dragon's notice states that he analyzed the historical performance of certain publicly traded comparator companies (the "Comparator Companies") and conducted and assessed valuation analyses performed based on (a) GTV's projected revenues and earnings, and calculated the value of this projected revenue stream (*i.e.*, the Discounted Cash Flow of the Income Method), and (b) assessed valuation based upon multiples of earnings and revenues for the Comparator Companies (*i.e.*, the Comparator Public-Traded Companies Method of the Market Approach). (*See id*.) Mr. Dragon also discussed how he considered the market's reaction to the GTV private stock offering (*i.e.*, Backsolve Method of the Market Approach) and recent valuations of pre-revenue companies in the special purpose acquisition company ("SPAC") sector as additional data informing his overall conclusions. (*See id*.)

Further, Mr. Dragon did not simply describe in the abstract what standard valuation techniques he utilized—he also supplied the government with the underlying data (all of which is either publicly available or derived from publicly available data) that he used in his analysis. Detailed tables reflecting analyses Mr. Dragon performed were annexed to Mr. Dragon's Supplemental Disclosure as follows:

- **Exhibit 1** provides both revenues and operating earnings for the first ten years for the Comparator Companies.
- **Exhibit 2** provides the annual growth rates for the revenues and operating earnings and revenues for the Comparator Companies.
- **Exhibit 3** provides both the standardized revenue for the Comparator Companies as well as the growth rate, forecast revenues, and standardized revenues for GTV as calculated in the A&M Report. From these numbers, Mr. Dragon calculated the compound annual growth rate for GTV as used in the A&M Report.
- **Exhibit 4a** provides Mr. Dragon's calculation of the weighted cost of capital and discount rate for guideline companies, and **Exhibit 4b** adjusts the weighted cost of capital and discount rate calculation for new venture companies. Based on these figures, Mr. Dragon provides his calculation for the discount rate for GTV at the time of the private placement.

- **Exhibit 5** provides Mr. Dragon's calculation of Beta (β) for the Comparator Companies—a metric used to assess systemic risk, an important component of discount rate analysis.

- **Exhibit 6** provides Mr. Dragon's calculation of relevant financial performance metrics for the Market Approach of valuation for the Comparator Companies.

- **Exhibit 7** presents the relevant valuation multiples—that is, the number, if multiplied by the relevant financial metric, that provides a company's valuation—for the Comparator Companies.

- **Exhibit 8** provides an analysis of the initial public offering results for each of the Comparator Companies.

- **Exhibit 9** provides historical information regarding the proliferation of SPACs in recent years.

Through these exhibits—along with the A&M Report—the government has been provided all relevant inputs used by Mr. Dragon in conducting his valuation of GTV. And through Mr. Dragon's description of the valuation techniques he used, Mr. Dragon has disclosed how he analyzed that data. Put simply, based on Mr. Dragon's disclosures, the government knows the calculations Mr. Dragon ran, the data that he ran those calculations on, and the output of those calculations: that a $2 billion valuation of GTV was reasonable, and well supported by available data and traditional valuation methods.

The government's complaint about Mr. Dragon's disclosure essentially boils down to an assertion that the government does not know how to read Mr. Dragon's data.[2] That argument misses the point, however: it is no surprise that it would take some expertise to comprehend Mr.

[2] By way of example, the government contends—based on its misapprehension of Exhibit 7—that Mr. Dragon will "put analysis before the jury intimating that a valuation of $10 billion was . . . reasonable." (Gov. Mot. at 6.) He will not. Rather, as evidenced by Exhibits 6 and 7, these figures are projections of GTV's value based on its forecasted earnings in the future, which, under accepted valuation techniques, inform his conclusion that a $2 billion valuation for GTV in August 2020 was reasonable.

Dragon's work because, as even the government concedes, valuation of a business is "the province of an expert." That is no different than any number of varying types of expert testimony. As talented as attorneys may be, they would likely need the assistance of an expert to understand fully an expert disclosure about DNA testing, for example. But the technical nature of the information in question does not change the fact Mr. Dragon has disclosed (more than) sufficient information such that another expert could, for example, use Mr. Dragon's data set to run a discounted cash flow analysis and either confirm or disprove his conclusions. That is what Rule 16 requires: sufficient information to give the government "a fair opportunity to prepare to cross-examine expert witnesses and *secure opposing expert testimony if needed*." *See United States v. Mrabet*, No. 23 Cr. 69 (JSR), 2023 WL 8179685, at *1 (S.D.N.Y. Nov. 27, 2023) (emphasis added and internal citations and quotations omitted). What the government seeks instead is a complete detailing from Mr. Dragon of each component of his testimony, which is beyond the scope of Rule 16's disclosure requirements, even as amended. Fed. R. Crim. P. 16, Notes of the Advisory Committee to the 2022 Amendments (the 2022 Amendment "does not require a verbatim recitation of the testimony the expert will give at trial").

The same is true with respect to the qualitative opinions that Mr. Dragon offers that further support GTV's value, namely about (1) the Backsolve Method of the Market Approach, (2) the censorship efforts of the CCP, and (3) the SPAC market. The reasons and relevance of each of these opinions is plain from the disclosure and the record in this case:

First, regarding the Backsolve Method, Mr. Dragon is merely providing notice to the government that he will opine that, under standard valuation principles, GTV's valuation is bolstered by the fact that investors chose to invest in GTV at a $2 billion valuation (*i.e.*, 200 million

shares were offered for a 10% stake in GTV, at a price of $1 per share), and, indeed, that the private placement was oversubscribed by nearly a quarter billion dollars.

Second, although the government complains that Mr. Dragon does not state how the CCP's censorship efforts play into the $2 billion valuation, Mr. Dragon never claimed that there was a dollar-for-dollar impact of the censorship on the company's value. Rather, as the Court previously held, "[e]vidence that the Chinese government has taken measures to suppress [Mr. Kwok]'s access to online platforms could support his argument that such a market niche existed, justifying his valuation." (Dkt. No. 243 at 7.) Mr. Dragon is simply stating that, based on his extensive experience in the valuation industry, it is true that a company's monopoly in a market can increase that company's value. Moreover, given the Court's Fox Hunt Order, the government's purported confusion over why that qualitative statement would apply to GTV and the CCP's censorship efforts specifically is plainly an attempt at playing dumb. For example, as the Superseding Indictment and [redacted] If GTV was exclusively able to host that popular content and resist the CCP's censorship efforts, then that would create the kind of monopoly that Mr. Dragon opines could enhance the value of the company. (*See* Dkt. No. 243 at 7.)

Third, regarding the SPAC market, Mr. Dragon provides notice that he intends to testify regarding the growth of the market for SPACs (as evidenced in Exhibit 9 to his supplemental disclosure), a market that Mr. Dragon will testify, by its nature involves pre-revenue, and frequently pre-operation, companies. Nowhere in his disclosure does Mr. Dragon claim—as the government wrongly implies—that his review of growth in the SPAC industry factors

quantitatively into his conclusion that a $2 billion valuation for GTV is reasonable. Rather, this opinion is directly responsive to the government's allegation that Mr. Kwok knew his statement regarding GTV's valuation was false "because . . . [GTV] was a new business that generated no revenue." (Indictment ¶ 17(d), *see also id.* ¶ 39(e).) Thus, Mr. Dragon's testimony on SPACs will help to explain why the government's flat assertion is demonstrably false, given common investment in pre-revenue, pre-operation companies.

The government plainly has sufficient notice under Rule 16 of Mr. Dragon's opinions and the "bases and reasons" for them. Accordingly, its motion to preclude or limit Mr. Dragon's testimony should be denied.

B. Mr. Dragon's Methodology Is Reliable

While claiming on the one hand to be unable to comprehend Mr. Dragon's methods, the government on the other hand argues that his methodology is unreliable. The government is wrong again, however—the reliability of Mr. Dragon's methodology is apparent from the face of his disclosure

First, his opinions are grounded in his nearly 30 years of experience in the valuation industry, a fact that supports the reliability of his testimony. *See U.S. Env't, Inc.*, 2002 WL 31323832, at *3 (permitting testimony from securities expert on the basis of his decades of related work and experience).

Second, as Mr. Dragon states in his disclosure, he arrived at his opinions by applying industry-standard valuation techniques, and thus his methodology is reliable. *See Lickteig v. Cerberus Cap. Mgmt., L.P.*, 589 F. Supp. 3d 302, 331–32 (S.D.N.Y. 2022) (finding valuation expert's methodology to be reliable under *Daubert* because the expert "applied such industry-standard valuation methodologies").

Third, Mr. Dragon reviewed case-specific materials, including the Superseding Indictment, the *Bai* complaint, and the A&M Report, which further supports the reliability of his methodology. *See United States v. Romano,* 794 F.3d 317, 333 (2d Cir. 2015) (expert's methodology was sufficiently reliable when it based on "his own experience" coupled with review of relevant documents); *McCullock*, 61 F.3d at 1043 (expert's "background and experience," coupled with review of relevant case records, was reliable).

Further, as the government concedes, its purported attacks on the reliability of Mr. Dragon's approach are material for cross-examination. (Govt. Mot. at 7-8.) That is the solution, not preclusion, because each of the alleged deficiencies that the government points to go to the weight that the jury should give to his testimony, not whether the jury should hear it in the first place. The Court should decline the government's invitation to improperly use its gatekeeping function to "supplant the adversary system or to resolve issues properly triable by a jury." *United States v. Diakhoumpa*, 171 F. Supp. 3d 148, 152 (S.D.N.Y. 2016).

The government's argument that any valuation of GTV rests on "several layers of impermissible hearsay" (Govt. Mot. at 7) is misguided. At the core, there is no statement—either from the A&M Report or in the materials on which A&M relied—that is being offered for the truth. These figures are simply projections—ones that Mr. Dragon used in his analysis—and which would similarly be used in any other context.[3] Further, where, as here, the alleged hearsay is "of a type reasonably relied upon by experts in a particular field" it can be among facts considered by an expert. Fed. R. Evid. 703. *See also United States v. Locascio*, 6 F.3d 924, 938 (2d Cir. 1993) ("[E]xpert witnesses can testify to opinions based on hearsay or other inadmissible evidence if

[3] The A&M Report and its accompanying projections are attached as Pohlman Declaration Exhibit B.

experts in the field reasonably rely on such evidence in forming their opinions."). The government cannot seriously contend that financial projections are not "of the type" of materials commonly relied upon by valuation experts; indeed, they are the cornerstone of all valuation analysis. The fact that Mr. Dragon's analysis relied upon purportedly "inadmissible evidence is therefore less an issue of admissibility for the court than an issue of credibility for the jury." *Id*.

Further, the government misconstrues the purported hearsay in question, and simply ignores the information provided by Mr. Dragon in his disclosure. The government contends that Mr. Dragon's methodology was to "us[e] a *different* company's *ipse dixit* forecasts, which were created by the individuals involved in the fraud at issue, and which for purposes of the analysis are simply assumed to be accurate." (Govt. Mot. at 7.) Nearly every portion of this statement is false. As an initial matter, the government's claim that this data is unreliable because it was prepared "by the individuals involved in the fraud at issue" ignores one glaring fact: the question of whether there was a fraud at all is precisely what the jury will be called upon to decide at trial. The government is certainly entitled to introduce evidence that the projections were inflated (evidence it does not have), cross-examine Mr. Dragon about the source of the data, and, if it has established a foundation, argue to the jury that it should not credit Mr. Dragon's analysis as a result. But it is not entitled to ask the Court to simply assume there was a fraud and that thus conclude that Mr. Dragon's methodology is flawed as a result.

Moreover, neither the A&M Report nor Mr. Dragon simply used the GNews numbers and assumed they were true. As stated in the A&M Report, A&M did not simply use GNews figures wholesale. Instead, after "test[ing] the reliability of certain inputs and assumptions in that model" the report adopted the "assumptions for user growth and operating margins" but used a different assumption for the starting user base. (Pohlman Decl. Ex. B at 2.) Mr. Dragon, in turn, took the

additional steps of conducting an independent assessment of "(1) the discount rate used, (2) the expected operating earnings margin, and (3) GTV's growth projections." (Govt. Mot. Ex. A at 2.) Mr. Dragon's analyses of these metrics are included as Exhibits 1, 2, 3, 4, and 5—exhibits that the government does not address in its motion. Thus, the government's statement that Mr. Dragon "simply assumed" the growth projections to be "accurate" is false: Mr. Dragon considered and assessed the reasonableness of GTV's projections on multiple bases and provided that analysis to the government.

The same is true with respect to the government's complaints that Mr. Dragon does not describe how he assessed the users calculation in the projections. Mr. Dragon, however, does not offer any independent opinions regarding the calculation of users in the GNews forecast—he relies on the projections contained in the A&M Report. Further, A&M's calculation of the multiple applied to monthly active users ("MAU") is provided at Schedule 5 of the A&M Report, and the application to GTV is provided at Schedule 6 to the A&M Report. The projections for GTV's MAU are provided at page 2 of the A&M Report and in Schedule 1 thereto. The government thus complains about information it already has in hand. To the extent the government wishes to challenge the financial projections or user calculations, it can do so, but the proper avenue for that is cross-examination and argument about weight, not preclusion of Mr. Dragon's testimony. *See McCullock*, 61 F.3d at 1044 ("Disputes as to the strength of [the expert's] credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.")

II. THE JURY SHOULD HEAR AND CONSIDER MS. SKLAR'S PROPOSED TESTIMONY

A. Ms. Sklar's Testimony Is Relevant

The government has alleged that Mr. Kwok induced the alleged victims into purchasing H-Coins ("HCN") and H-Dollars ("HDO") by misrepresenting aspects of those tokens, but then also seeks to preclude Ms. Sklar's expert testimony that directly contradicts the government's assertions. In particular, Ms. Sklar's testimony squarely rebuts the following government allegations:

First, the government alleges that HCN and HDO are not true cryptocurrencies, including because there was not significant trading activity reflected on the blockchain. (Indictment ¶ 19(e).) Ms. Sklar will testify that because HCN and HDO were "minted using smart contracts, which can be seen on the public Ethereum blockchain, and are purchased using fiat currency and traded, [HCN and HDO] meet the common market understanding of 'cryptocurrencies.'" (Govt. Mot. Ex. B at 2, ¶ 1.) Ms. Sklar will further testify that because of the way that centralized cryptocurrency exchanges, such as the Himalaya Exchange, are structured, "evidence that there is not substantial on-chain trading or redemption activity of a token, such as is the case with HCN or HDO, does not demonstrate that the token is not a cryptocurrency." (*See id*. at 3, ¶ 5(g).)

Second, the government further alleges that Mr. Kwok's purported co-conspirator, Mr. Je, misrepresented that HDO was used to purchase a Ferrari (the "Ferrari Sale"), because there was a corresponding fiat transfer to the seller of the vehicle. (Indictment ¶ 19(d).) Ms. Sklar will testify that "[m]arket participants in the cryptocurrency industry typically understand the concept of 'using' a token to purchase a product to mean that the seller of the good has agreed to accept the token to purchase a product, and that the buyer has agreed to accept the product in exchange for the token," and that "[t]hat is even the case if the seller—*i.e.*, the recipient of the token—

subsequently decides to redeem their token and receive fiat currency." (Govt. Mot. Ex. B at 4, ¶ 6(d).) Accordingly, Ms. Sklar will testify, "[b]ased on the norms and practices in the cryptocurrency industry, the fact that the seller decided to engage in the second transaction and ultimately received fiat does not mean that the first transaction did not involve a cryptocurrency." (*Id*.)

As a result, it is no surprise that the government seeks to exclude key parts of Ms. Sklar's proposed testimony—that testimony thoroughly undercuts the government's case with respect to the Himalaya Exchange. The government's reasons for precluding or limiting Ms. Sklar's testimony, however, are meritless. Accordingly, Mr. Kwok respectfully submits that the Court should deny the government's motion to preclude or limit Ms. Sklar's testimony.

B. Ms. Sklar's Disclosure Sufficiently Describes the Bases for Her Opinions

While conceding that Ms. Sklar's supplemental notice adequately discloses the expert opinions for which she is proffered, the government nevertheless argues that it still is missing notice of the "bases and reasons for her opinions." (Govt. Mot. p. 12.) This argument is based on a selective reading of the disclosure and fundamentally fails to take into account that Ms. Sklar is an industry expert who is eminently qualified to apply her experience and knowledge to testify about the basic fact questions the government has placed at issue—such as whether HCN and HDO were "cryptocurrencies" and how a centralized cryptocurrency exchange works. Likewise, the government cannot seriously argue that the disclosure does not adequately identify, in addition to her experience, the materials she relies on, which are expressly listed. The pedantic point that "publicly available materials" are not broken out in a separate list is both hardly a basis for exclusion and misses the obvious: critical information that Ms. Sklar relies on is available on the public blockchain.

"[E]xpert testimony does not [have to] rest on traditional scientific methods." *United States v. Litvak*, 808 F.3d 160, 180 n. 25 (2d Cir. 2015) (internal citations and quotations omitted). Rather, "[e]xperts of all kinds tie observations to conclusions through the use . . . 'general truths derived from . . . specialized experience.'" *Id*. (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148–49 (1999)). Such experts are particularly useful where the allegations involve a specialized or technical industry, and "expert testimony may help a jury understand unfamiliar terms and concepts." *See United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) (upholding admission of securities industry expert); *see Litvak*, 808 F.3d at 180 n.25 (collecting examples of industry experts).

Ms. Sklar's disclosure makes clear that the bases for her opinions include her considerable experience in the cryptocurrency industry. (*See* Pohlman Decl. Ex. C at 1-2; Govt. Ex. B at 1.) That includes approximately a decade working as a senior official the Federal Reserve and the Commodities Futures Trading Commission (the "CFTC"), and advising with respect to the agency's response "to virtual currencies through consumer education, asserting the CFTC's regulatory authority, surveilling trading in derivative and spot markets, prosecuting fraud, abuse, manipulation and false solicitation" and at LabCFTC, which, among other things, serves "as a platform to inform the CFTC's understanding of new [fintech] technologies," including cryptocurrencies.[4] In addition, Ms. Sklar's disclosures reflect that she has worked as a lawyer advising clients in the cryptocurrency field for years, as well as a member of significant industry groups, including the Global Digital Asset and Cryptocurrency Association, which was "established to guide the evolution of digital assets, cryptocurrencies, and the underlying

[4]https://www.cftc.gov/PressRoom/PressReleases/7558-17#:~:text=LabCFTC%20is%20the%20agency's%20focal,CFTC's%20understanding%20of%20new%20technologies.

blockchain technology within a regulatory framework designed to build public trust, foster market integrity and maximize economic opportunity for all participants."[5] (*See* Pohlman Decl. Ex. C at 1-2; Govt. Ex. B at 1.)

That experience alone is sufficient to qualify Ms. Sklar to opine on relevant aspects of the cryptocurrency industry. *See McCullock* 61 F.3d at 1043 (a witness' "background and practical experience" is sufficient to qualify them under *Daubert*). As a result, the government has sufficient information about how Ms. Sklar formed her opinions—through her substantial experience in the cryptocurrency industry. (*See* Govt. Mot. Ex. B at 1 (describing Ms. Sklar's experience and stating that she "applied her industry expertise" in arriving at her opinions)); *see also, e.g.*, *United States v. Patel*, No. 3:21-CR-220 (VAB), 2023 WL 2643815, at *33–34 (D. Conn. Mar. 27, 2023) (industry experts' notices sufficient where they stated that the expert was relying on "experience managing and sourcing engineering resources for aerospace projects" during his thirty-four years working at Honeywell, Inc. and Allied Signal, an aerospace original equipment manufacturer" and "on [his] extensive experience in managing and providing subject matter expertise to aerospace programs related to contractor and supplier/contractor relationships").

It is not difficult to see how this experience more than adequately forms a reliable basis for Ms. Sklar's testimony about the relatively basic fact questions the government has put at issue, such as fairly routine aspects of cryptocurrency exchanges and digital assets. In particular, much of Ms. Sklar's testimony focuses on (i) the perceived benefits and use cases of cryptocurrencies; (ii) qualities of cryptocurrencies generally; (iii) the ways in which centralized cryptocurrencies operate typically; and (iv) common market understandings related to cryptocurrency transactions. (*See* Govt. Ex. B at 2-4, ¶¶ 1, 2, 5, 6.) Obviously, Ms. Sklar's experience with a U.S. government

[5] https://global-dca.org/

regulatory agency tasked with overseeing the cryptocurrency industry, counseling clients in the industry, and as an industry expert explains how she arrived at these general opinions.

Moreover, when combined with her review of documents specific to the Himalaya Exchange, as the disclosures make clear, these more generalized opinions form the bases for Ms. Sklar's opinions about HCN and HDO. (*See id*. at 2-3, ¶¶ 2, 5(g).) Contrary to the government's contention, Ms. Sklar's disclosures also make clear the bases for her specific conclusions about HCN, HDO, and the Exchange. With respect to the tokens, Ms. Sklar reviewed the white papers for both tokens (the "HCN Whitepaper," the "HDO Whitepaper," and together, the "Whitepapers"), (*see id*. at 1-2); and the "public Ethereum blockchain" on which HCN and HDO were minted (*see id*. ¶ 2). From that review, and based on her experience, she concluded that these tokens were consistent with the industry's understanding of what a cryptocurrency is. (*See id*. ¶ 2.)

With respect to the Exchange, Ms. Sklar reviewed the Whitepapers, (*see id*. 1-2, ¶¶ 3-4); the contractual arrangements the Exchange had made to custody cryptocurrency, including with BitGo Inc. ("BitGo"), (*id*.) and vendor agreements into which the Exchange had entered, including with Armanino LLP ("Armanino") and CertiK.. (*Id*.; *cf.* Pohlman Decl. Ex. D, Disclosure of Prof. Amin Shams, ¶ 4.) Based on this information, and applying her experience and knowledge of the qualities of a centralized exchange, Ms. Sklar concluded that the Exchange was designed as a centralized exchange, and that, as a consequence of that fact and the way that centralized exchanges operate, the lack of on-chain activity is entirely expected and not, as the government contends, evidence that HCN and HDO were not cryptocurrencies. (*See* Govt. Mot. Ex. B ¶¶ 4-5.) Thus, with respect to her opinions about HCN, HDO, and the Exchange, Ms. Sklar's disclosure makes clear exactly how she arrived at those conclusions: she reviewed information about aspects

of the tokens and the Exchange, compared those to her substantial experience in the cryptocurrency industry, and drew certain conclusions about the tokens and Exchange based on that comparison.

The government does not engage with any of this considerable information, but rather simply complains that Ms. Sklar's disclosure did not specifically identify every piece of "publicly available" information or documents that Ms. Sklar considered. As an initial matter, to the extent the government is confused about what "publicly available" information Ms. Sklar is referring to, that is a reference to the publicly available blockchain on which HCN and HDO were minted, which is available to view using a website called Etherscan.[6]

C. Ms. Sklar's Proffered Testimony Is Admissible

The government's remaining objections to Ms. Sklar's testimony similarly should also be rejected.

1. Ms. Sklar's Third Opinion Does Not Impermissibly Rely on Hearsay

The government also objects to Ms. Sklar's third opinion—namely that the Himalaya Exchange was designed to act as a centralized cryptocurrency exchange. (*See* Govt. Mot. Ex. B at 2, ¶ 3 (arguing that her opinion on this is merely a vehicle to parrot hearsay in the audit report

[6] As for the government's contention that it is entitled to an itemized list of all of the publicly available materials Ms. Sklar considered, the government cites no authority for that position. Nor could it. While the rule for expert disclosures in civil cases requires identification of "the facts or data considered by the witness in forming [the expert's opinions," Fed. R. Civ. P. 26(a)(2)(B)(ii), there is no similar requirement in the rules for expert disclosures in criminal cases, Fed. R. Crim. P. 16(b)(1)(C)(iii). There is no ground for the Court to read into a criminal case the requirements imposed by the Federal Rules of Civil Procedure, especially considering that the Advisory Committee notes make clear that "[a]lthough the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases." Fed. R. Crim. P. 16, Notes of Advisory Committee on 2022 Amendment; *see also United States v. McCray*, 7 F.4th 40, 46 (2d Cir. 2021) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal citations and quotations omitted). All the criminal rules require is that Mr. Kwok identify the bases and the reasons for Ms. Sklar's opinions, a standard which Ms. Sklar's supplemental disclosure satisfies.

by Armanino).) As an initial matter, the government's objection to describing the Himalaya Exchange as a cryptocurrency exchange is an odd one. A cryptocurrency exchange is simply a platform on which cryptocurrency is traded. Not even the government disputes that HCN was traded on the Himalaya Exchange—a significant portion of the government's own cryptocurrency expert's disclosure is focused on *purported trading patterns of HCN at the Exchange*. (*See* Pohlman Decl. Ex. D at 38-39 (analyzing data "collected from the public blockchain record" regarding HCN and HDO trading).) Thus, Ms. Sklar's conclusion that the Himalaya Exchange was a cryptocurrency exchange is hardly controversial.

In any event, the Court should reject the government's claim that Ms. Sklar's third opinion is an impermissible attempt to smuggle the Armanino Report before the jury. *First*, to be clear, nowhere in Ms. Sklar's disclosure does it say that she intends to testify about the Armanino Report's findings for the truth of a matter asserted there. Thus, there is no risk that Ms. Sklar will "put the contents of the Armanino audit materials that are otherwise inadmissible before the jury." (Govt. Mot. at 15.)[7] What Ms. Sklar's disclosure actually says is that she considered a host of materials, including the Armanino Report, the Whitepapers, and the Exchange's vendor arrangements, applied her significant industry experience with cryptocurrency exchanges, and concluded that the Exchange was designed to function as a centralized cryptocurrency exchange. (*See* Govt. Mot. Ex. B at 1-2, ¶ 3.) In other words, Ms. Sklar will simply be testifying to opinions that may be based, in some part, on hearsay, which is permissible for an expert. *See Locascio*, 6 F.3d at 938 ("[E]xpert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions.").

[7] Contrary to the government's breathless speculation, nothing in Ms. Sklar's disclosure suggests that she reviewed or relied upon communications between Himalaya Exchange employees. (*See* Govt. Mot. at 15 n.6.) That is because she did not.

Second, the government's next argument that "[t]here is no industry standard . . . indicating that experts in the field of cryptocurrency field rely upon non-public components of private audits to assess whether an entity 'was designed to function as a cryptocurrency exchange'" is puzzling. (Govt. Mot. at 16.) Again—as Ms. Sklar's disclosure makes clear—her opinion is not based solely on the Armanino Report, but also on the Whitepapers, which the government concedes will be in evidence, and other materials like the custodial arrangement with BitGo and the Exchange's relationship with CertiK. (*See id*. at 15.) In fact, Ms. Sklar relied on the fact that the Exchange hired Armanino, which even according to the government is "an accounting firm that, at one time, had a practice focusing on audits of various cryptocurrency-linked businesses," (*see id*. at 14), as evidence that the Exchange operated as a cryptocurrency exchange—it would have made no sense, for example, to hire auditors that specialize in restaurants instead. And regardless of whether there is an "industry standard" for cryptocurrency industry experts to rely on an auditors' report, the government offers no reason why, in assessing the simple fact of what a company does, an expert in a field cannot rely on an auditor's description of a company's business.[8] The government curiously emphasizes that the report was based on a "private audit" that has "non-public" aspects, but that has no relevance—indeed, in the government's own authority, the hearsay upon which the expert permissibly relied was statements by detectives, victims, and informants, all of which are also presumably "non-public." *See United States v. Mulder*, 273 F.3d 91, 102 (2d Cir. 2001).

Third, the government's argument about the Armanino Report undercuts its own position. The government's own expert, Professor Shams, relies *exclusively* on the Armanino Report to reach his proposed conclusions about the supposed lack of reserves for the HDO stablecoin.

[8] As noted above, Ms. Sklar does not intend to testify about the substance of the Armanino Report's findings.

(Pohlman Decl. Ex. D at 66-72.) Specifically, the government proffers Prof. Shams to testify that the Himalaya Exchange's reserves for the HDO stablecoin were inadequate expressly because "*Armanino's audit claimed* that only $400 million HDO [out of a supposed 1.5 billion] was collateralized." (*Id.* at 69 (emphasis added); *see also id*., at 70 ("*Based on Armanino's audit*, Himalaya claimed to have $400 million in its bank accounts, but it remains unclear whether those reported funds were used to back HDO or were co-mingled with other customer funds into the exchange. Even if those funds are independent of other customer funds, they only back 27% of the 1.5 billion HDO issued") (emphasis added).) That $400 million reserve figure—which is not supported in any of the other materials Prof. Shams relies on—is *the* critical premise for his opinion with respect to HDO's reserves. Without parroting to the jury the Armanino Report for the truth on this issue, as his expert disclosure plainly does, Prof. Shams could offer *no* opinion at all with respect to the supposed adequacy of HDO reserves. By contrast, Ms. Sklar permissibly relies on numerous materials and her industry experience to come to an independent conclusion about the centralized nature of the Exchange. The difference between Ms. Sklar's reliance in part on the Armanino Report to inform her conclusion, together with other materials combined with her independent expertise, on one hand, and Prof. Sham's exclusive reliance on it for the truth of the matter asserted to reach his conclusion, on the other, thus neatly illuminates the distinction between Ms. Sklar's permissible use of that report and Prof. Shams' impermissible reliance on its hearsay in forming their respective opinions. (*Compare* Govt. Mot. Ex. B at 1-2, *with* Pohlman Decl. Ex. D at 69-70.)

2. Ms. Sklar's Third, Fourth, and Sixth Opinions Are Reliable

The government also argues that the Court should preclude Ms. Sklar's testimony that (i) the Himalaya Exchange was designed to be a centralized cryptocurrency exchange (her third and fourth opinions, *see* Govt. Mot. Ex. B p. 2, ¶¶ 3-4) and (ii) market participants in the

cryptocurrency industry would still understand the exchange of a product or good for cryptocurrency to be a purchase using the token (as happened in the alleged Ferrari Sale), even though the original owner of the product subsequently redeems the tokens into fiat (her sixth opinion, *see id*. ¶ 4). The government claims that this testimony is purportedly based on an unreliable methodology. As an initial matter, these arguments should be rejected because they are merely a variant of the mistaken position addressed above that every expert needs to meet *Daubert's* standard for scientific testimony to be admissible. That's simply wrong, as has already been explained. *Litvak*, 808 F.3d at 180 n.25 (expert testimony does not [have to] rest on traditional scientific methods") (internal citations and quotations omitted). Instead, "[e]xperts of all kinds tie observations to conclusions through the use general truths derived from specialized experience." *Id*. (cleaned up).

Moreover, the government's challenge to Ms. Sklar's third and fourth opinions fails because it does not (and cannot) challenge the reliability of her fifth opinion, which offers a comprehensive explanation of how centralized cryptocurrency exchanges work and which is itself the base of expert knowledge that she proposes to apply to form opinions three and four. Specifically, Ms. Sklar proposes to testify in her unchallenged fifth opinion, among other things, that "[c]entralized cryptocurrency exchanges often maintain a single wallet or set of wallets in which they store all of a certain token traded on the exchange"; that when executing a trade, "the exchange does not necessarily transfer the relevant cryptocurrency to an individual wallet for [a] user," and instead "the tokens remain in the exchange's centralized wallet," with an accompanying entry made on an internal ledger as a credit to the user's account with the exchange; and that, as a result, "when a user trades cryptocurrency through a centralized exchange, that trading activity would not be reflected on the [public] blockchain . . . ." (Govt. Mot. Ex. B at 2-3, ¶ 5) Ms. Sklar

proposes to apply this expert knowledge to her understanding of the functioning of the Himalaya Exchange—as informed by the materials she reviewed, which were disclosed in her notice and supplemental notice—to arrive at the opinions (three and four) that the Exchange was in fact designed to function and operated as a "centralized cryptocurrency exchange."

Put simply, Ms. Sklar reviewed the information concerning the nature and operations of the tokens, the Exchange, and the Ferrari Sale, compared that information to her experience about cryptocurrencies, cryptocurrency transactions, and cryptocurrency exchanges, and arrived at her opinions about the nature of HCN, HDO, the Exchange, and transactions like the Ferrari Sale. That is precisely the type of methodology that is appropriate for an industry expert like Ms. Sklar. *See Romano,* 794 F.3d at 333 (expert's methodology was sufficiently reliable when it based on "his own experience" coupled with review of relevant documents); *McCullock*, 61 F.3d at 1043 (expert's "background and experience," coupled with review of relevant case records, was reliable).

The government asks the Court to simply ignore all of that and find that Ms. Sklar's testimony should be precluded as expert *ipse dixit* testimony, citing to *United States v. Ray*, 583 F. Supp. 3d 518 (S.D.N.Y. 2022) and the Court's decision in *S.E.C. v. Ripple*, No. 20 Civ. 10832 (AT), 2023 WL 5670711 (S.D.N.Y. Mar. 6, 2023). Neither case, however, supports the government's position. In *Ripple*, the Court precluded an expert from offering his opinion that announcements by Ripple caused the price of XRP to rise because the expert had not controlled for "confounding factors" or made "an appeal to academic literature to support a determination of causation." 2023 WL 5670711, at *13. There is no similar "analytical gap" here however—Ms. Sklar is not offering to opine on anything as technical as to how media attention impacted a cryptocurrency's trading price, an inherently statistical endeavor. Rather, she will simply offer her opinions as to relevant characteristics about HCN, HDO, the Exchange, transactions like the

Ferrari Sale, and the import of those characteristics to the government's specific allegations. Her experience, coupled with her review of relevant documents, is more than sufficient to support such fundamental assertions about industry topics. *See, e.g.*, *U.S. Env't, Inc.*, 2002 WL 31323832, at *3 (testimony about the significance of "trading patterns" to industry participants was sufficiently supported by expert's experience in the industry).

Similarly, *Ray* offers no support to the government's position. In *Ray*, the court excluded expert testimony concerning a defendant's alleged mental state, including whether he had "delusion-like beliefs" with "paranoid cognitive style." 583 F. Supp. 3d at 542. In particular, the court found that the expert's opinions were not based on a reliable methodology because the purported conditions from which the defendant suffered were not medical conditions or symptoms, meaning that there was no guidelines by which another psychiatrist could evaluate whether the defendant truly suffered from a delusional belief system. *See id*. *Ray* is inapposite for two reasons.

First, again, Ms. Sklar is not attempting to opine on anything as technical as a medical diagnosis, but simply industry practices and understanding, which is simply not subject to the same type of analytical process. *Second*, here, another cryptocurrency industry expert could scrutinize Ms. Sklar's claims easily. For example, that expert could review the public blockchain and HCN/HDO smart contracts, as Ms. Sklar did, and decide whether they viewed these tokens as cryptocurrencies. So too with Ms. Sklar's view about the nature of the exchange—another expert can review the sources about the Himalaya Exchange that Ms. Sklar relied upon and decide whether they describe a centralized cryptocurrency exchange. And another expert can review the Superseding Indictment and decide whether the charging instrument's allegations accord with the typical understanding of cryptocurrency industry participants. *Ray* involves dramatically different facts, and thus does not support the government's request.

At bottom, the government's claim collapses to an argument that because Ms. Sklar's opinions are predicated, in part, on her industry experience, that means that they cannot be independently replicated or sourced in independent studies. (Govt. Mot. at 17.) Neither purported flaw undermines Ms. Sklar's analysis. *First*, the fact that an expert's personal experience cannot be fully replicated is not a basis on which to exclude their testimony. *See Romano*, 794 F.3d at 333 ("To be sure, it is possible that [the expert's] methods are not entirely replicable because they are based in part on his personal experience as a coin dealer for several decades; but Rule 702 itself provides that the court may admit evidence that will assist the jury based on the witness's specialized knowledge."). *Second*, to the extent the government believes that Ms. Sklar did not properly rely on academic literature or studies to arrive at her conclusion, that is the basis for cross-examination, not preclusion. *See McCullock*, 61 F.3d at 1044 ("Disputes as to the strength of [the expert's] credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony."). The government will have an opportunity to pursue its (misguided) criticisms of Ms. Sklar's testimony, but those contentions are not a basis to deprive Mr. Kwok the opportunity to introduce admissible expert testimony.

3. Ms. Sklar's Opinions Are Appropriate and Do Not Require a Limiting Instruction

Finally, the government argues that Ms. Sklar cannot testify that the Himalaya Exchange complied with any particular regulatory requirements or industry best practices. (*See* Govt. Mot. at 18-19.) The government concedes, however, that these issues "need not be reached now, but the Government merely requests the opportunity to be heard on such [a limiting] instruction at the conclusion of Ms. Sklar's testimony, if any." (*See id*. at 20.)

Mr. Kwok does not intend to argue that, simply because the Himalaya Exchange complied with regulatory requirements or industry standards, he did not have the requisite *mens rea*. Given that the government is not seeking preclusion on these grounds at this time, Mr. Kwok will not belabor this point, except to note two items. *First*, Ms. Sklar's testimony about whether HCN or HDO are cryptocurrencies, the fact that the Himalaya Exchange is a centralized cryptocurrency exchange and the import of that for the government's allegations, and the way that crypto-industry participants would view transactions, bear not only on the initial question of whether Mr. Kwok's alleged statements were false, but also whether any alleged misrepresentation concerning those facts would be material, a necessary element of the offense. Excluding expert testimony that bears on the materiality of alleged misrepresentations in a fraud case is grounds for reversal. *See Litvak*, 808 F.3d at 184 (finding that exclusion of industry expert testimony about materiality was not harmless error because without it, the defendant "was left with little opportunity to present his non-materiality defense"). *Second*, the government has alleged that the Himalaya Exchange is part of the alleged RICO enterprise—evidence that the Exchange was engaged in a legitimate business, such as proof that it was engaged in efforts to comply with regulatory requirements or industry best practices, bears on the government's burden to show that the alleged RICO pattern had the necessary continuity. *See, e..g. Cofacredit*, *S.A. v. Windsor Plumbing Supply Co., Inc.,* 187 F.3d 229, 242 (2d Cir. 1999). Thus, to the extent the government later chooses to raise these issues, the Court should reject the government's request to limit Ms. Sklar's testimony for these reasons.

III. THE JURY SHOULD HEAR AND CONSIDER MR. DORAN'S TESTIMONY

The Court previously has rejected the government's serial efforts to preclude or limit one of Mr. Kwok's key defenses at trial—that the CCP and its concerted efforts to silence or censor political dissidents, including Mr. Kwok, via Operation Fox Hunt and similar influence campaigns (hereafter "FOX HUNT"), help demonstrate that Mr. Kwok and the NFSC are Chinese dissidents,

and provide an alternative explanation for conduct the government seeks to portray as part of the alleged fraud or as "consciousness of guilt." (*See, e.g.*, Dkt. No. 243 at 5-9; Dkt. No. 319 at 13-14.) The government's latest attempt to preclude the jury from appropriately considering Mr. Kwok's defense—this time by limiting in advance the testimony of Mr. Kwok's FOX HUNT expert, Paul Doran—also should be denied. Courts adhere to a "liberal standard of admissibility for expert opinions." *Nimely v. City of New York*, 414 F.3d 381, 395 (2d Cir. 2005), beginning with "a presumption that expert evidence is admissible," *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 115 (S.D.N.Y. 2015) (citing *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995)). No persuasive reason exists to overcome that presumption and limit Mr. Doran's testimony in advance of trial.

The government effectively concedes, as it must, that Mr. Doran's revised disclosure is sufficient under Fed. R. Crim. P. 16, and that he is qualified, by dint of his experience and training, to testify as an expert regarding FOX HUNT. (*See* Govt. Mot. at 20-26.) The government also further concedes that there are some topics about which Mr. Doran should be permitted to testify. *Id*. Thus, the government limits its objection to certain of Mr. Doran's opinions, contending that those opinions are irrelevant and confusing, and would improperly transmit inadmissible hearsay to the jury. *Id.* The government is mistaken.

Mr. Doran's proposed testimony is relevant and necessary because it will help the jury fully and properly weigh and determine "whether [Kwok]'s explanations ultimately hold water, [which] is, of course, a question for the jury." (Dkt. No. 243 at 7.) Mr. Doran will provide ten opinions at trial (*see* Govt. Mot. Ex. C):

- Opinions 1, 2, 4, 5, and 6 provide necessary background regarding the CCP, the core beliefs that motivate its relentless pursuit of Mr. Kwok and other dissidents, and the purpose, structure, and general methodology of FOX HUNT. This background is crucial if the jury is to understand FOX HUNT and properly weigh and determine the

reasonableness of, *inter alia*, (i) Mr. Kwok's fear of the CCP; (ii) his belief that companies dedicated to penetrating the "Great Firewall of China" would be a successful investment; and (iii) the protective actions taken by him and his movement out of concern for CCP attacks. The government concedes that portions of all of these opinions should be permitted, but that the testimony should be limited to a "focused explanation." (Govt. Mot. at 22.)

- Opinion 7 details the specific tactics employed by the CCP in FOX HUNT, all of which have been used to surveil, harass, intimidate, and threaten Mr. Kwok and his followers. As with Opinions 1 through 6, the government concedes that such opinion testimony is admissible if limited to a "focused explanation." (*Id.*)

- Opinions 3, 8, and 9 detail that the U.S. government recognizes the threat posed by FOX HUNT to dissidents living in the United States, and that the government has sought to combat FOX HUNT, including by bringing "criminal charges against numerous individuals for targeting . . . Miles Kwok, [including] for [redacted] Mr. Kwok online as part of Operation FOX HUNT." (Govt. Mot. Ex. C, at Opinion 9.) The government disputes that Mr. Doran should be permitted to testify about these topics. Of course, how serious the FOX HUNT threat is in the United States, and how seriously the U.S. government itself takes that threat, is highly relevant to the jury assessing the authenticity and strength of Mr. Kwok's own concerns. *See infra* pp. 32-34.

- Opinion 10 details how "[c]ountries allied to the United States have also taken measures to combat illegal Chinese intelligence operations in their countries." (*Id.*, Opinion 10.) This opinion is relevant to assessing the authenticity and strength of Mr. Kwok's concerns, and the actions and precautions he took outside the United States to protect himself and his supporters from the CCP and FOX HUNT.

Demonstrably, each of these ten opinions are highly relevant to this case and to the jury's determination of guilt and innocence. *See* Fed. R. Evid. 702 (expert testimony admissible if it "will help the trier of fact to understand evidence or determine a fact in issue").

In a vain attempt to prevent the jury from fully understanding and considering the threat actually posed by FOX HUNT, the government invents, from whole cloth, a purported limitation it contends was imposed by the Court in its prior orders—*viz*, that the Court has "conditionally permitted limited evidence of CCP targeting for the singular purpose of establishing [Mr. Kwok's]

belief that he was being targeted by the CCP and refuting any notion that [his] related concerns were 'mere paranoia.'" (Govt. Mot. at 26 (citing Dkt No. 319 at 14).) The government is wrong.

Unsurprisingly, the government cites to, but never fully quotes, the Court's actual May 2, 2024 Order, because the Court imposed no such *ex-ante* limitation in its Order. To the contrary, the Court made clear it would not summarily exclude FOX HUNT evidence from the jury's purview:

> The Government moves to broadly exclude "evidence regarding CCP activities . . . beyond the defendants' own testimony as to their state of mind," arguing that the "probative value of such evidence is substantially outweighed by a danger of confusing the issues and misleading the jury." Gov. Mem. at 47. It contends that the Court should only permit evidence of CCP targeting that "could have affected [Defendants'] state of mind"—for example, "public reports that they read at that time." *Id.* at 50.
>
> In effect, the Government asks that the Court reconsider its previous order, which held that evidence showing that Guo, "his family, his co-defendants, or the corporate entities relevant to the indictment have been targeted by the CCP" is "material" under Federal Rule of Criminal Procedure 16.8 ECF No. 243 at 6. The Court declines to do so. Contrary to the Government's arguments, evidence showing that Defendants' fears of CCP targeting were objectively legitimate—even if they were not aware of the specific pieces of evidence—gives credence to certain nonculpable explanations for their actions. Put simply, a jury could find that the targeting evidence elevates Defendants' alternative narrative beyond mere paranoia.
>
> Certainly, presentation of the CCP-related evidence might risk "confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. If so, the Government may raise these objections at the appropriate times. The Court—as the Government requests—will "closely police Defendants' testimony to avoid impermissible bases for a verdict." Gov. Mem. at 52 (capitalization altered). *But the Court will not preclude an entire category of relevant evidence before Defendants begin to present their case.* The motions are, therefore, DENIED.

Dkt No. 319 at 13-14 (emphasis added); *see also id.* at 15 ("As explained above, however, the Court will not preclude Defendants at this juncture from introducing evidence of CCP targeting

for other permissible purposes."); *id.* ("the Court cannot evaluate relevance in the abstract").)[9]

Even assuming, *arguendo*, that the Court had imposed the limitation the government self-servingly invents, Mr. Doran's intended expert testimony falls comfortably within that purported limitation. On its face, all of Mr. Doran's intended testimony is relevant to the jury's understanding and determining "[Mr. Kwok's] belief that he was being targeted by the CCP and refuting any notion that [his] related concerns were 'mere paranoia.'" (Govt. Mot. at 26.) For example, the fact that U.S. law enforcement took action to stop FOX HUNT activities in this country is powerful evidence that the threat is real, and not some figment of Mr. Kwok's imagination. That is particularly the case when those law enforcement actions are specifically premised on threats against and efforts to silence Mr. Kwok—there is no better evidence that his concerns of his *personal* targeting by the CCP are not mere "paranoia" than the fact that law enforcement authorities took steps to address it. For these reasons, Mr. Doran's opinions are relevant and admissible under Rules 401 and 702. *See United States v. Onumonu*, 967 F.2d 782, 787 (2d Cir. 1992) (expert testimony that "made the existence of [the defendant's] belief . . . more probable than it would have been without the evidence" was admissible).

Nor should Mr. Doran's testimony be excluded under Rule 403. Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger

[9] The government also contends the Court's February 26, 2024 Order (Dkt No. 243) supports its purported limitation. (*See* Govt. Mot. at 21.) Here too, the government is wrong. *First*, the Court granted Mr. Kwok discovery as to FOX HUNT, over the government's strenuous relevancy objections. In doing so, the Court recognized the relevancy and importance of FOX HUNT to this proceeding. (Dkt. 243 at 5-7.) *Second,* the February 26 Order concerned discovery; it did not concern what testimony or evidence could be published to the jury. (*Id.*) These are two entirely different questions. For example, while the Court denied as premature Mr. Kwok's request for discovery "concerning the targeting of any of the alleged victims of the schemes described in the Indictment by the Chinese government" (*id.* at 8), the Court subsequently ruled that Mr. Kwok could introduce at trial evidence that the supposed victims had been contacted or coerced by the CCP or its agents, denying the government's motion to exclude such evidence from trial (Dkt. No. 314 at 15).

of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). Rule 403 is a balancing test. Evidence may only be precluded under Rule 403 if its relevancy and probative value is "substantially outweighed" by a danger of "unfair" prejudice, confusion, or waste of time. *Id*. The intensity, breadth, and serious nature of the CCP's attacks upon Mr. Kwok—attacks recognized and confirmed by the U.S. government—are extremely relevant to many of the issues in this case. This means that the government must demonstrate a concomitantly high amount of prejudice for it to be said to be so unfair that the jury must be kept from considering it. The government's bald and diffuse speculation that the "very length and depth of Mr. Doran's proposed testimony" will "cause 'confusion of issues' and potentially 'mislead the jury'" (Govt. Mot. at 25), does not come close to meeting the government's heavy burden. Indeed, presenting this crucial evidence regarding the CCP and FOX HUNT through the testimony of an expert is more likely to assist that jury's understanding of the issue than to confuse it.

Finally, the government raises the specter that Mr. Doran intends to "impermissibly transmit inadmissible hearsay to the jury." (*Id.* at 25.) Specifically, the government objects to Mr. Doran potentially "restating public remarks by U.S. law enforcement officials, describing the 'remit' of U.S. law enforcement agencies by restating language from their public websites, and testifying about the contents of 'DOJ charging instruments' in other cases." (*Id.* (internal citations omitted).) The government's contention that Mr. Doran's testimony should be excluded because it will do nothing more than transmit "hearsay" to the jury is misplaced.

"[E]xperts may testify to opinions based on hearsay and other inadmissible evidence, if experts in the field reasonably rely on such evidence in forming their opinions." *Locascio*, 6 F.3d at 938; Fed. R. Evid. 703 (same). The government does not even assert, much less prove, that

using established sources like charging instruments and the public statements of FBI Directors is somehow unusual or out-of-bounds for experts like Mr. Doran, whose position as a security risk consultant requires him to be aware of various security threats and law enforcement responses to them to properly assess risk.

Moreover, while an expert cannot simply be a conduit for the raw transmission of hearsay, he may "'form his own opinions by applying his extensive experience and a reliable methodology to the inadmissible materials.'" *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) (quoting *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2003)). Thus, in *Mejia*, the principal case cited by the government (Govt. Mot. at 25), an NYPD officer proffered as an expert simply "repeat[ed] hearsay evidence [to the jury] without applying any expertise whatsoever," a practice that allowed the government in *Mejia* blatantly "to circumvent the rules prohibiting hearsay." *Id.* at 197. In addition, the Second Circuit faulted the officer's testimony because he could not explain to the jury "how he had pieced together bits of information from different sources and reached a studied conclusion that he then gave to the jury." *Id.* at 198. That is a far cry from what Mr. Doran proposes to do here. Instead, Mr. Doran has used established documents from the FBI and DOJ among multiple other sources, and then applied his expertise in forming his stated opinions that (i) FOX HUNT is not some kind of international anti-corruption campaign (Opinion 3); (ii) that the DOJ and FBI have acted against Chinese police and intelligence agents conducting FOX HUNT operations in the U.S. (Opinion 8); and (iii) FOX HUNT has targeted Mr. Kwok personally (Opinion 9). Mr. Doran also will be prepared to testify as to how he used his expertise and training to "piece[] together bits of information from different sources and reach[] a studied conclusion." *Mejia*, 545 F.3d at 198. This is all that is required under Rules 702 and 703.

In any event, the materials identified by the government are not hearsay. Mr. Doran will

not be introducing those statements for the truth of the matter—for example, that the defendants in cases brought by the government against FOX HUNT agents are guilty of the crimes charged in the charging instruments. *See* Fed. R. Evid. 801(c). Instead, they are merely being used to show that an action occurred—namely that law enforcement took action to stop CCP targeting of Mr. Kwok, which demonstrates that the threat is real and not "mere paranoia."

For all the foregoing reasons, the government's motion to preclude or limit Mr. Doran's expert testimony should be denied.

IV. THE JURY SHOULD HEAR AND CONSIDER MR. BISHOP'S TESTIMONY

A. Mr. Bishop's Expert Disclosures Provide Adequate Notice Under Rule 16

1. Mr. Bishop's Expert Disclosure Properly Describes His Opinions, Which Are Relevant to the Charged Offenses

The government alleges that beginning in or about June 2020, approximately $150 million in victim funds were taken through various loan agreements with local centers of operation for Mr. Kwok's movement—the "Farms." (Indictment ¶¶ 17, 17(e).) The government contends that Mr. Kwok and Mr. Je misappropriated funds that were raised through the Farm Loan Program. (*Id.* ¶ 17(f).) The government specifically alleges that various purported uses of the Farm Loan Program proceeds—on transfers to individuals related to Mr. Kwok, on private jet services, and on yacht expenses—are evidence of misrepresentations given that the Loans were purportedly to be used for "a Farm's 'general working capital purposes.'" (*Id.* ¶ 17(e).)

In submissions to the Court, the government has expounded on its allegations and described the purported fraud with greater specificity. Specifically, in its recent motions in *limine* (Dkt. No. 273), the government alleged that "from August 2020 through February 2021, at least $130 million of Farm Loan Program proceeds were deposited" into a specific bank account associated with the entity ACA, the "ACA Bank Account." (*Id.* at 44.) The government continues to allege

that specific transfers—including transfers identified with specificity in the Indictment—can be traced from the ACA Bank Account to a bank account for the entity Lamp Capital to various uses the government challenges, including "yacht expenses, luxury vehicles, and a private plane." (*Id*.) In both the Indictment and its briefing, the government contends that the fact that funds were commingled in bank accounts and that multiple bank accounts and corporate entities were used is evidence of structuring and money laundering. (Indictment ¶ 20, Dkt. No. 273 at 36, 44.)

Mr. Bishop's proffered opinions go directly to these allegations. Mr. Bishop would testify that he reviewed bank records from entities that were down-stream recipients of funds from the ACA Bank Account (the "Operating Entities"), and reviewed—on a transaction by transaction basis—the way that funds in those accounts (the "Operating Entities Accounts") were used before and during the period of the alleged Farm Loan Program. (Govt. Mot. Ex. D at 2.) Based on his experience as a former Special Agent with the IRS and with a major accounting firm, Mr. Bishop categorized the outflows from the Operating Entities Accounts into four categories: (a) outflows related to the payment of corporate expenses, such as payroll expenses ("Corporate Expenses"); (b) outflows in connection with political and protest activities that were associated with Mr. Kwok's political movement, the Whistleblower Movement ("Political Movement Expenses"); (c) outflows that could relate to personal spending by Mr. Kwok and his family ("Personal Expenses"), and (d) other expenses that did clearly not fit into the foregoing categories ("Uncategorized Expenses"). (*Id.* at 1-2.) Mr. Bishop additionally categorized the inflows into the account as alleged Farm Loan Program inflows ("Farm Loan Inflows") and other inflows ("Other Inflows"). (*Id.* at 2.) In total, Mr. Bishop and his team analyzed more than ninety bank accounts and categorized more than 20,000 transactions in conducting this analysis. (*Id*. at Ex. A (Pohlman Decl. Ex. E).)

Based upon this review, Mr. Bishop arrived at four narrow opinions: (1) that the Operating Entities expended funds on a mixture of Corporate Expenses, Political Expenses, and Personal Expenses, both before and during the period in which the government alleges the Farm Loan Program was in operation; (2) that there was a consistent pattern of expenditures relating to Personal Expenses both before and during the alleged Farm Loan Program period; (3) that Other Inflows (that is, inflows from sources other than the Farm Loan Program) exceeded the purported Farm Loan Inflows and inflows from undetermined sources and (4) that the Other Inflows exceeded the aggregate Personal Expenses and Undetermined Expenses during the relevant period. (Govt. Mot. Ex. D at 2-3.) These opinions are directly responsive to the government's allegations about the Farm Loan Program.

First, the government contends that the use of multiple corporate entities and bank accounts and the commingling of funds are evidence that Mr. Kwok and others were engaged in structuring and money laundering. Mr. Kwok is entitled to argue that funds were not commingled because he was engaging in money laundering, but rather due to innocent causes—such as his concerns over the CCP's interference with the banking relationships of Mr. Kwok and those close to him. (*See* Dkt. 319 at 14 (noting that CCP targeting could give credence to certain non culpable explanations for Mr. Kwok's actions).) Mr. Bishop's first opinion—that there was a consistent pattern of commingling both before and during the Farm Loan Program—bolsters Mr. Kwok's argument, because it shows that Mr. Kwok and his associates were commingling funds since 2015, three years before the start of the alleged RICO enterprise and five years before the purported beginning of the Farm Loan Program. Put simply, the fact that this same pattern existed before the alleged fraud undercuts the government's contention that the fraud was the reason for the pattern. Evidence that undercuts the government's arguments is relevant and admissible. *See e.g.*, *United*

States v. Murray, 736 F.3d 652, 659 (2d Cir. 2013) (reversing conviction where defendant was not allowed to offer evidence contradicting the government's version of events).

Second, the government contends that a representation in the loan agreements for the Farm Loan Program that the loan proceeds would be used for the "working capital" of the Farms was false because some of the loan proceeds were misappropriated and used to pay for personal expenses for Mr. Kwok and his family through the Operating Companies. (Indictment ¶ 17(e).) To prove its claim, the government must show that at the time the "working capital" representation was made, Mr. Kwok knew that the statement was false, *i.e.*, the he intended at that time to misappropriate the money. The government contends that Mr. Kwok had a motive to lie because he was not truly wealthy. (*See* Dkt. 273 at 23, stating that Mr. Kwok "portrayed" himself as a billionaire.) Mr. Kwok is entitled to argue that he never had any such intention, and that the jury should credit that assertion because Mr. Kwok did not believe that he needed the Farm Loan proceeds to maintain his lifestyle. Mr. Bishop's second, third, and fourth opinions all bolster that contention. For example, the fact that Mr. Kwok's pattern of personal spending remained materially consistent before and during the Farm Loan Program, even though he purportedly had access to more than one hundred million dollars obtained through the program, undercuts the government's narrative that Mr. Kwok would steal money because he needed it to fund his lifestyle.

The third and fourth opinions—that the amounts of money coming in from other sources exceeded the Farm Loan Inflows and were sufficient to cover the Personal Expenses and Undetermined Expenses—further support Mr. Kwok's rejoinder to the government that he had no reason to steal from the Farms because he did not need the money. Expert testimony that contradicts the government's contentions about the defendant's motive are plainly relevant. *See United States v. Diallo*, 40 F.3d 32, 35 (2d Cir. 1994) (reversing conviction because, where district

court permitted government to call an expert "to establish an economic motive for [the defendant] to smuggle heroin," the district court should have also allowed the defendant to call an expert to show "an economic motive to smuggle gold," because "[t]urnabout is fair play, even in the federal courts").

Despite the obvious relevance of these opinions, the government nevertheless argues that Mr. Bishop's testimony should be excluded because there is a risk that it will confuse the jury about the elements of the charged offenses. This argument is a red herring. Nothing in Mr. Bishop's testimony will even mention any of the elements of the charged offenses and the Court can and will instruct the jury that it must take its instruction as to the law from the Court. As a result, there is no basis under Rule 403 to exclude relevant expert testimony. *See United States v. Blanco*, 811 F. App'x 696, 706 (2d Cir. 2020) (noting giving a limiting instruction concerning probative evidence "help[ed] to maintain the Rule 403(b) balance").

2. Mr. Bishop's Expert Disclosure Properly Describes the Bases and Reasons for His Opinions

Mr. Bishop's disclosure also provides the bases and reasons for his opinions. Although the government essentially ignores this aspect of Mr. Bishop's disclosure, the starting point for his opinions is his considerable experience as a former supervisory special agent with the IRS's Criminal Investigations Division ("CID") and from working at a significant accounting firm. (Govt. Mot. Ex. D at 1; Pohlman Decl. Ex. F at Ex. A.) The government cannot seriously dispute that this experience can serve as the support for Mr. Bishop's opinions, which essentially involve testimony about the proper characterization of expenses and patterns of fund flows. *See*, *e.g.*, *United States v. Sherry*, 100 F.3d 943 (2d Cir. 1996) (upholding admission of expert testimony from IRS agent about tax computations, including characterization of expenses); *United States v.*

Ortiz, 112 F.3d 506 (2d Cir. 1997) (permitting expert testimony from IRS agent about patterns of financial transactions associated with money laundering).

Although Mr. Bishop's testimony could have been grounded entirely in that experience, his disclosure went much further than that. *First*, in his disclosure, Mr. Bishop identified the documents upon which he based his analysis, including bank account records for the Operating Entities Accounts. (*See* Mot. Ex. D at 2.) *Second*, Exhibit A to Mr. Bishop's supplemental disclosure specifically describes his methodology for characterizing inflows and outflows for the Operating Entities Accounts, and discloses that Mr. Bishop determined the counterparties for each transaction based on their name and online research, the date parameters he applied, and the types of spending that he placed into each outflow category (for example, what kinds of spending Mr. Bishop considered to be Political Movement Expenses and the political movement events with which those expenses were linked). (*See* Pohlman Decl. Ex. E.) Exhibit A additionally discloses twenty-one assumptions that Mr. Bishop made in categorizing the inflows and outflows for the Operating Entities Accounts. Finally, Exhibit A discloses Mr. Bishop's conclusion with respect to the counterparties and characterization for each transaction in the Operating Entities Account during the relevant time period (*i.e.*, more than 20,000 such transactions). Mr. Bishop's expert disclosures provide more than enough notice to the government as to the bases and reasons for his opinions.

Nevertheless, the government bewilderingly claims that it cannot properly assess Mr. Bishop's testimony because it purportedly has "no way to know (a) which counterparties were categorized by name; (b) what guidance or metrics Mr. Bishop used to determine which of his four categories to assign to specific names; (c) and source of any such guidance or metrics regarding those determinations." (Govt. Mot. at 27.) This argument misses the mark. As an initial matter,

Exhibit A specifically discloses the "guidance or metrics" Mr. Bishop used in characterizing expenses—for example, it states that, in identifying Political Movement Expenses, that these include "payments made to political advocates, and media consultancy and production companies specializing in political campaigns" and that these expenses "were also determined by cross referencing transaction dates against the dates and location of political movement events organized by Kwok," which are also specifically identified in Exhibit A. (*See* Pohlman Decl. Ex. E.) As for the source of those determinations, Mr. Bishop's disclosure also makes that clear: he applied his decades of experience as an IRS agent and employee of an accounting firm to determine which category was appropriate and further supported that determination through online research.

Similarly, the government's claim that it cannot know which counterparties Mr. Bishop characterized by name is unavailing. Just as with Ms. Sklar, the government seeks to impose civil expert disclosure requirements on a criminal prosecution—unfortunately for the government however, Rule 16 does not mirror Federal Rule of Civil Procedure 26's requirement that an expert disclose all "facts and data considered" as part of an expert disclosure. *See supra* p. 19 n.6. Thus, Mr. Bishop is under no obligation to itemize each and every item that he considered in assessing each counterparty.

Moreover, the government is not actually prejudiced in any way, because for each of the more than 20,000 transactions that were categorized, Exhibit A identifies the counterparty, categorization of the expense, and even further categorizes expenses into sub-categories. Thus, for example, if the government thinks that it is inappropriate for Mr. Bishop to characterize a payment to Amazon Web Services as a Corporate Expense relating to "Technology/Electronics/Software," then it has more than enough information to cross-examine Mr. Bishop about it, or retain its own expert to rebut his characterizations. That is what Rule 16

requires. *See Mrabet*, 2023 WL 8179685, at *1 ("The [2022 expert notice] amendment is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed.").

B. Mr. Bishop's Methodology Is Reliable

The government also tries to claim that Mr. Bishop's methodology is not sufficiently reliable to be admitted, but in reality (and indeed as the government effectively concedes), these are matters for cross-examination, not preclusion.

As an initial matter, the government contends that Mr. Bishop's opinions are not opinions at all, but rather are summary testimony. The government's position is ironic. If Mr. Bishop could offer all of the testimony in his disclosure as a summary witness, then the government would get none of the disclosure it has received so far about his anticipated testimony and would be even more in the dark than it (incorrectly) claims that it is. Indeed, that's precisely what the government has done—it has stated that it intends to call an accounting professional, Paul Hinton, to testify about the flow of funds in this case as a summary witness, and thus, has not described Mr. Hinton's methodology in conducting that analysis.

Regardless, the government's argument is without merit. Mr. Bishop does more than provide a summary of the transactions contained in the bank records he assessed. Mr. Bishop and his team took additional steps, including: the matching of transactions, the removal of duplicate transactions, the verification of the information, and, most importantly, based upon the methodology and assumptions Mr. Bishop provided, and his experience as former IRS Special Agent, Mr. Bishop categorized the transactions in question. Without the application of his accounting expertise to the financial records in question, Mr. Bishop would be limited to testimony regarding the flows of funds and could not, for example, offer his conclusion that Other Inflows exceeded the aggregate Personal Expenses and Undetermined Expenses during the relevant period.

In support of its argument that Mr. Bishop's testimony is not "expert" testimony, the government contends that it was "not provide[d] sufficient information to evaluate . . . which counterparties Mr. Bishop is associating with the Farm Loan program, and thus which transactions constitute Farm Loan Inflows for purposes of his 'expert' opinions." (Dkt 322 at 29.) This is flatly false. Mr. Bishop's primary assumption relating to this prong is listed as Assumption No. 2 on the "Assumptions" tab: "Transfers from ACA (beginning in June 2020) were categorized as Farm Loan [Inflows]"—*i.e.*, for the purposes of his analysis, Mr. Bishop assumes that ***every*** dollar that flowed from the ACA Bank Account to the Operating Entities Accounts—from the inception of the Farm Loan Program forward—was sourced from the Farm Loan Program.[10] Mr. Bishop additionally identifies other inflows to the Operating Entities which he categorized as Farm Loan Inflows. (*See* Pohlman Decl. Ex. E., "Assumptions" tab, at Assumptions Nos. 5, 6.)

Turning to Mr. Bishop's methodology itself, there is no reasonable dispute that it is reliable. Initially, the government simply ignores Mr. Bishop's experience as a former IRS Special Agent and accounting professional, which clearly and explicitly informs his methodology. That experience adds a significant degree of reliability to his analysis. *See*, *Figueroa* 254 F. Supp. 2d at 368 (noting that "an expert may base his opinion on experience alone"); *U.S. Env't, Inc.*, 2002 WL 31323832, at *3 (expert's testimony was reliable where it was "based on his knowledge of

[10] As the Court knows, it has denied the government's request to admit certain records about the ACA Bank Account (the "ACA Records") because the government could not authenticate the documents. (Dkt No. 319.) Although Mr. Bishop reviewed and considered the ACA Records in preparing his expert disclosure before the Court's ruling, given his assumption that all dollars flowing from the ACA Bank Account during the period of the Farm Loan Program are Farm Loan Inflows, Mr. Bishop did not need to draw any particular conclusions based on the ACA Records. As a result, his opinions are unchanged by the fact that the ACA Records will not be in evidence.

typical trading activity and the types of trading patterns that an experienced trader would recognize as irregular, and as such, are supported by his 30 years of experience in the securities industry").

Nor does it matter that Mr. Bishop is not an expert in political movements, as the government previously has argued—"[a]n expert need not be disqualified merely because he or she does not possess experience tailored to the precise product or process that is the subject matter of the dispute." *Ripple*, 2023 WL 5670711, at *4 (internal citation and quotation omitted). As a former IRS supervisory special agent tasked with conducting investigations in many industries and an accounting professional, Mr. Bishop has extensive experience in examining business records and deciding how to categorize financial transactions, and there is nothing particularly specialized about the types of expenses at issue here that would place his opinions beyond the scope of his experience. Similarly, it does not detract from the reliability of Mr. Bishop's methodology that it is based on his personal experience and thus cannot be precisely replicated by another. *See Romano*, 794 F.3d at 333 ("To be sure, it is possible that [the expert's] methods are not entirely replicable because they are based in part on his personal experience as a coin dealer for several decades; but Rule 702 itself provides that the court may admit evidence that will assist the jury based on the witness's specialized knowledge.").

The remainder of the government's purported attacks on the reliability of Mr. Bishop's methodology are—as the government in essence concedes (*See* Govt. Mot. at 32)—matters for cross-examination, not a basis for preclusion. For example, the government quibbles with certain (well-reasoned) assumptions made by Mr. Bishop—including assumptions that are favorable to the government's case, such as the inclusion of a portion of a wire transfer from an entity called Greenwich Land as a Farm Loan Inflow. (*Id*. at 29.) It also contends that Mr. Bishop has not identified any online sources or scholarly works that guided his analysis. (*Id.* at 27.) "Disputes as

to the strength of [the expert's] credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony." *McCullock*, 61 F.3d at 1044. To the extent the government wants to challenge Mr. Bishop's assumptions, it will have a chance to do so when it cross-examines him.

Similarly, the government argues that Mr. Bishop improperly excluded or included certain types of inflow or outflows from his characterizations. For example, the government disputes Mr. Bishop's characterization of inflows related to HCHK, and, as a result, argues that Mr. Bishop did not properly account for inflows into HCHK from a company called Mountains of Spices. (Govt. Mot. at 31.) As Mr. Bishop will explain, however, he did not characterize those transactions as Farm Loan Inflows because they did not match the pattern of the Farm Loans that the government itself described in the Superseding Indictment or its filings--indeed, based on the information produced by the government to date, even its own "summary witness," Mr. Hinton, does not apparently view these transfers as part of the Farm Loan Program. But more fundamentally, the government's contention is simply a complaint about "over- or under-inclusion of data" which "speak[s] to the weight of [Mr. Bishop's testimony], not its admissibility." *Ripple*, 2023 WL 5670711, at *13.[11] The government's motion to exclude Mr. Bishop's testimony should be denied.

C. The Court Should Deny the Government's Request for a *Daubert* Hearing

Finally, the Court should reject the government's alternative request for a *Daubert* hearing. The government does not dispute that Mr. Bishop is qualified to be an expert, but argues that a

[11] The same is true of the government's assertion that Mr. Bishop did not properly account for the government's position that there were fraudulent transfers into the Operating Entities Accounts before the advent of the Farm Loan Program. As an initial matter, the government's position requires the Court and Mr. Kwok to simply accept the government's allegations that there was any fraud in the first place, which is clearly inappropriate. But regardless, this complaint is simply one about how Mr. Bishop characterizes data, which is a matter for cross-examination. *See supra* pp. 43-44.

hearing should be held to assess the reliability of Mr. Bishop's methodology. "While the gatekeeping function requires the district court to ascertain the reliability of [an expert's] methodology, it does not necessarily require that a separate hearing be held in order to do so." *United States v. Williams*, 506 F.3d 151, 161 (2d Cir. 2007). In this case, as described above, the Court can easily conclude that Mr. Bishop's methodology is reliable based on the detailed disclosure that Mr. Kwok has provided and the parties' briefing. Moreover, at trial, Mr. Kwok will elicit the foundation for Mr. Bishop's testimony, and the government can cross-examine him about it, meaning that his methodology can be tested before he offers his opinions. A *Daubert* hearing is not required in such a scenario. *See id*. (it is "particularly true" that no *Daubert* hearing is required "if, at the time the expert testimony is presented to the jury, a sufficient basis for allowing the testimony is on the record"); *see*, *e.g.*, *United States v. Santiago*, 199 F. Supp. 2d 101, 112 (S.D.N.Y. 2002) ("[t]he Court concludes that the reliability of Mr. Amato's expert testimony can be answered through the foundation that the Government must establish before the Court accepts Mr. Amato as an expert witness").

CONCLUSION

For the foregoing reasons, Mr. Kwok respectfully submits that the Court should deny the government's motion in *limine* to exclude or limit the testimony of Mr. Kwok's expert witnesses.

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