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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11 **(HON. THOMAS J. WHELAN)**

12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 DUNCAN D. HUNTER,
16 Defendant.

Case No. 18-CR-3677-W

**DEFENDANT’S RESPONSE IN
OPPOSITION TO GOVERNMENT’S
MOTION TO ADMIT EVIDENCE OF
USE OF CAMPAIGN FUNDS TO
PURSUE PERSONAL
RELATIONSHIPS**

DATE: July 1, 2019
TIME: 10:00 a.m.
COURTROOM: 3C
JUDGE: Hon. Thomas J. Whelan

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20 Defendant DUNCAN D. HUNTER (“Mr. Hunter”), by and through his attorneys,
21 Gregory A. Vega, Ricardo Arias, and Philip B. Adams, hereby submits this response in
22 opposition to the Government’s motion to admit evidence of use of campaign funds to
23 pursue personal relationships (“Motion”).

24 **I. INTRODUCTION**

25 The Government charges Mr. Hunter with conspiring with Margaret Hunter
26 (“Mrs. Hunter”) to convert campaign funds for personal use. As such, the ultimate issue
27 before the Court is whether Mr. Hunter used campaign funds for expenditures that
28 would have existed “irrespective of” his campaign or duties as a Federal officeholder.

1 The indictment identifies 18 individuals that it claims Mr. Hunter had a personal
 2 relationship with and with whom Mr. Hunter allegedly spent campaign funds for non-
 3 campaign related purposes. As such, the proper scope of the Government’s inquiry with
 4 respect to each of these individuals and the alleged expenses incurred in connection with
 5 them is the extent to which each relationship served a “political purpose¹” and whether
 6 each expenditure would have existed irrespective of that political purpose. However,
 7 rather than engaging in a straightforward analysis of whether certain expenditures
 8 lacked a sufficiently political nexus to warrant the use of campaign funds, the
 9 Government’s Motion seeks permission to focus the jury’s attention on Mr. Hunter’s
 10 infidelity. As the Court is well aware, the allegations in the Motion are so controversial
 11 and prejudicial that merely filing the Motion has tainted the jury pool against Mr.
 12 Hunter based on the salacious allegations.

13 The Government claims, wrongly, that this evidence “is necessary for the jury to
 14 consider in evaluating the case” and contends Mr. “Hunter’s intimate relationships
 15 demonstrate his knowledge and intent to embezzle campaign funds.” This is simply
 16 untrue. Evidence that some of Mr. Hunter’s relationships were “intimate” is neither
 17 relevant to whether any expenditure of campaign funds would have existed “irrespective
 18 of” Mr. Hunter’s campaign, nor necessary (or appropriate) for the jury to consider when
 19 evaluating the case. The Government filed its Motion to publicly embarrass Mr. Hunter
 20 with evidence that reflects poorly on his character, and the minimal (if any) probative
 21 value of this evidence is substantially outweighed by the substantial risk of unfair
 22 prejudice. Accordingly, the Court should deny the Motion and prevent the Government
 23 from distracting the jury with this salacious and prejudicial information.

24
 25
 26 ¹ The complex realities of modern politics makes it increasingly difficult to determine
 27 whether an expenditure warrants the use of campaign funds under the “Irrespective
 28 Test” set out in 52 U.S.C. § 30114(b), which is precisely why Congress tasked the FEC
 (and not the Justice Department) with identifying questionable uses of campaign funds
 and resolving those issues on a case-by-case basis. *See* 11 C.F.R. § 113.1(g)(1)(ii).

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1 **II. RESPONSE IN OPPOSITION**

2 **A. The Government’s Intimacy Evidence is Neither Relevant to The Charges**
3 **Nor Admissible at Trial.**

4 Evidence of Mr. Hunter’s “intimate affairs” is not directly relevant to the ultimate
5 issue in this case, whether Mr. Hunter knowingly converted campaign funds to his
6 personal use. 52 U.S.C. 30114(a)(6) permits the use of campaign funds “for any []
7 lawful purpose unless prohibited by subsection (b)” 52 U.S.C. § 30114. Subsection (b)
8 provides the “Irrespective Test,” to determine whether the use of Campaign funds
9 constitutes a conversion to personal use:

10 [A] contribution or donation shall be considered to be converted to personal
11 use if the contribution or amount is used to fulfill any commitment,
12 obligation, or expense of a person that would exist irrespective of the
13 candidate's election campaign or individual's duties as a holder of Federal
14 office, including--

- 15 (A) a home mortgage, rent, or utility payment;
- 16 (B) a clothing purchase;
- 17 (C) a noncampaign-related automobile expense;
- 18 (D) a country club membership;
- 19 (E) a vacation or other noncampaign-related trip;
- 20 (F) a household food item;
- 21 (G) a tuition payment;
- 22 (H) admission to a sporting event, concert, theater, or other form of entertainment
23 not associated with an election campaign; and
- 24 (I) dues, fees, and other payments to a health club or recreational facility.

25 52 U.S.C. § 30114. Evidence is relevant if it has “any tendency to make the existence of
26 any fact that is of consequence to the determination of the action more probable or less
27 probable than it would be without the evidence.” Fed. R. Evid. 401. Evidence which
28 cannot meet this standard is inadmissible. Fed. R. Evid. 402.

Evidence that Mr. Hunter’s relationships with individuals 14-18 were intimate
relationships has no tendency to make any fact of consequence as to the determination
of whether a particular expenditure would have existed irrespective of Mr. Hunter’s
campaign than it would be if the relationships were strictly platonic.

1 Unlike intimacy, the fact that an individual's relationship with Mr. Hunter
2 includes a professional aspect that directly, or indirectly, relates to his campaign or
3 duties as a holder of Federal office, is directly relevant to whether Mr. Hunter could
4 properly use campaign funds for an expense in connection with that individual. In its
5 quest to highlight the intimate nature of these relationships, the Government fails to
6 meaningfully consider the fact that, just as with Mr. Hunter's platonic relationships, his
7 friendships often blur the line between personal and professional, which is a widespread
8 occurrence in modern politics. However unpopular the notion of a married man mixing
9 business with pleasure, the Government cannot simply dismiss the reality that Mr.
10 Hunter's relationships with Individual's 14-18 often served an overtly political purpose
11 that would not have existed irrespective of his occupation. Indeed, the Government's
12 stated concern that Mr. "Hunter may suggest he was justified in spending campaign
13 funds on *all* of his 'meetings' with these individuals" because they "worked as lobbyists
14 or congressional staffers" implicitly concedes that Mr. Hunter was justified in spending
15 campaign funds on at least some of his meetings with these individuals.

16 Rather than address this gray area or quibble over the fundamentally vague
17 application of the irrespective test under such circumstances, the Government's Motion
18 focuses exclusively on Mr. Hunter's intimate relationships for the purpose of
19 publicizing Mr. Hunter's infidelity. For example, while strategically emphasizing the
20 costs incurred in connection with Mr. Hunter's "romantic liaisons" and "intimate
21 affairs" the Government conveniently minimizes the fact that nearly every expense it
22 references in its Motion was incurred in connection with a legitimate political activity.

23 Moreover, even if the Court determines that such evidence has some slight
24 relevance to the issues in this case, it should still deny the Motion on the grounds that it
25 constitutes impermissible character evidence, the probative value of which is
26 substantially outweighed by the prejudicial impact under Rule 403. *See United States v.*
27 *Bailey* 696 F.3d 794, 799 (9th Cir. 2012).
28

1 **B. Evidence of Mr. Hunter’s Affairs Constitutes Impermissible Character**
 2 **Evidence Under Rule 404(b)**

3 The Government contends that Rule 404(b) does not preclude this evidence
 4 because the Rule does not apply “to evidence of the very acts charged as crimes in the
 5 indictment” and “the intimate nature of Hunter’s relationships is [] inextricably
 6 intertwined with the charged offense.” However, the indictment does not charge Mr.
 7 Hunter with having intimate relationships, and for the reasons explained above, whether
 8 or not Mr. Hunter has an intimate or strictly platonic relationship with a particular
 9 individual does not tend to prove any material point in the Government’s case.

10 Evidence of a person's character or character trait is not admissible to prove that
 11 on a particular occasion the person acted in accordance with that character or trait. Fed.
 12 R. Evid. 404(a). Similarly, evidence of a crime, wrong, or other act is not admissible to
 13 prove a person's character in order to show that on a particular occasion the person acted
 14 in accordance with the character. Fed. R. Evid. 404(b); *See United States v.*
 15 *Romero*, 282 F.3d 683, 688 (9th Cir.2002). Courts within the Ninth Circuit use a four-
 16 part test to determine the admissibility of evidence pursuant to Rule 404(b):

17 Such evidence may be admitted if: (1) the evidence tends to prove a
 18 material point; (2) the other act is not too remote in time; (3) the evidence
 19 is sufficient to support a finding that defendant committed the other act;
 and (4) (in certain cases) the act is similar to the offense charged.

20 *Id.*; *United States v. Bailey*, 696 F.3d at 799. The Government “has the burden of
 21 proving that the evidence meets all of the above requirements.” Furthermore, courts
 22 must ensure that the purported purpose for which the Government offers evidence is
 23 more than just a sham for using it against a defendant as proof of character. *See, United*
 24 *States v. Merriweather*, 78 F.3d 1070, 1074–1079 (6th Cir. 1996) (emphasizing the need
 25 for a cautious analysis of evidence of uncharged misconduct). Indeed, Rule 404(b)
 26 excludes character evidence for good reason:

27 Character evidence is of slight probative value and may be very prejudicial.
 28 It tends to distract the trier of fact from the main question of what actually
 happened on the particular occasion. It subtly permits the trier of fact to

1 reward the good man and to punish the bad man because of their respective
2 characters despite what the evidence in the case shows actually happened.

3 Rule 404, Advisory Committee Notes on Rule 404 (quoting California Law Revision
4 Commission). Notwithstanding the Government’s claim that the intimate nature of
5 Hunter’s relationships “will not be used to argue anything about Hunter’s character” the
6 Court should carefully consider whether this evidence is truly necessary for the
7 Government to present its case or whether the Government is actually offering it for a
8 different purpose: to highlight Mr. Hunter’s infidelity. Just as the *Merriweather* court
9 emphasized the need for courts to cautiously analyze evidence of uncharged
10 misconduct, this Court should carefully consider the Government’s true purpose for
11 offering evidence of Mr. Hunter’s “intimate personal relationships.” *See United States v.*
12 *Merriweather*, 78 F.3d at 1074–1079. Mr. Hunter is not on trial for being an unfaithful
13 husband, yet this evidence invites the trier of fact to punish Mr. Hunter for his infidelity
14 despite what the case shows actually happened. *See* Rule 404, Advisory Committee
15 Notes on Rule 404 (quoting California Law Revision Commission).

16 Moreover, even if the Government satisfies its burden under Rule 404(b), the
17 Court must preclude this evidence because “the probative value is substantially
18 outweighed by the prejudicial impact under Rule 403.” *Bailey*, 696 F.3d at 799.

19 **C. The Unfair Prejudice of this Evidence Substantially Outweighs the Probative**
20 **Value.**

21 Under Federal Rule of Evidence 403, “the court may exclude relevant evidence if
22 its probative value is substantially outweighed by a danger of one or more of the
23 following: unfair prejudice, confusing the issues, misleading the jury, undue delay,
24 wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. Courts
25 regularly exclude evidence and argument focusing on character or controversial
26 behavior when such evidence is prejudicial and not directly relevant to the charged
27 offense. *See, e.g. United States v. Corsmeier*, 617 F.3d 417, 420 (6th Cir. 2010).
28 “Evidence is unfairly prejudicial if it makes a conviction more likely because it

1 provokes an emotional response in the jury or otherwise tends to affect adversely the
 2 jury's attitude toward the defendant *wholly apart from its judgment as to his guilt or*
 3 *innocence of the crime charged.*” *United States v. Haischer*, 780 F.3d 1277, 1282 (9th
 4 Cir. 2015) (quoting *United States v. Yazzie*, 59 F.3d 807, 811 (9th Cir.1995)) (emphasis
 5 in original). Courts should be hesitant to admit evidence of a criminal defendant’s
 6 marital infidelity due to the “risk [] that the jury will be distracted from whether he
 7 committed the charged crimes and will convict [the defendant] because they do not
 8 approve of his morals.” *U.S. v. Young*, 702 F.Supp.2d 11 at 15 (D. Me. 2010). Where
 9 the Government seeks to admit evidence of slight probative value “it's an abuse of
 10 discretion to admit it if there's even a modest likelihood of unfair prejudice or a small
 11 risk of misleading the jury.” *United States v. Wiggan*, 700 F.3d 1204, 1213 (9th Cir.
 12 2012) (quoting *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir.1992)).

13 In support of its contention that “the probative value of the evidence [showing
 14 Mr. Hunter’s intimate relationships] is high,” the Government cites *Old Chief v. United*
 15 *States*, 519 U.S. 172, 184 (1996) ([T]he Rule 403 ‘probative value’ of an item of
 16 evidence ... may be calculated by comparing the evidentiary alternatives.”) However,
 17 the Government had no issue finding evidentiary alternatives with respect to its
 18 description of Mr. Hunter’s relationship to the other thirteen individuals referenced in
 19 the indictment. Indeed, the Government provided a sufficiently detailed description of
 20 Mr. Hunter’s relationship with every other person mentioned in the indictment without
 21 the need to clarify whether or not Mr. Hunter was “intimate” with them. For example,
 22 the Government managed to describe Mr. Hunter’s relationship with Individual 1A
 23 (“1A”) (who has both personal and professional ties to Mr. Hunter) without describing
 24 whether or not the relationship was ever “intimate.” Additionally, at trial, the
 25 Government is expected to argue that Mr. Hunter’s use of campaign funds to pay for a
 26 round of golf with 1A constituted a personal use of campaign funds without mentioning
 27 whether or not Mr. Hunter ever engaged in any intimate activities with 1A.
 28

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1 Similarly, the Government is perfectly capable of describing the nature Mr.
2 Hunter’s relationship with individuals 14-18 and presenting its case as to why the
3 related expenditures constituted a personal use of campaign funds without informing the
4 jury that Mr. Hunter also “engaged in intimate personal activities” with these
5 individuals. While this salacious evidence provides welcomed fodder for the media, as
6 evidenced by the attention this Motion received from both national and local news
7 outlets, its questionable probative value is substantially outweighed by the
8 unquestionable danger of unfair prejudice to Mr. Hunter. *See, McCoy v. Kazi*, 2010 WL
9 11465179 at *3 (C.D. Cal. 2010) (excluding evidence of defendant’s extramarital affairs
10 even if it were relevant, because the “jurors, feeling disgust and hostility toward [the
11 defendant], may determine the outcome of the trial on those sentiments and not the facts
12 of th[e] case.”) As evidenced with Individuals 1-13, the Government can undoubtedly
13 describe Mr. Hunter’s relationship with Individuals 14-18 as both “personal and
14 professional,” and still manage to properly present its case.

15 Accordingly, the Court should note admit evidence of Mr. Hunter’s marital
16 infidelity due to the substantial risk of unfair prejudice.

17 **III. CONCLUSION**

18 For the foregoing reasons, Mr. Hunter respectfully requests the Court deny the
19 Government’s motion to admit evidence of use of campaign funds to pursue personal
20 relationships.

21
22 Dated: June 28, 2019

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