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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. CHRISTOPHER LISCHEWSKI, Defendant.	No. 18-cr-00203-EMC **UNITED STATES' OPPOSITION TO DEFENDANT'S RULE 29 MOTION AND REQUEST FOR ADDITIONAL JURY INSTRUCTIONS AND SPECIAL VERDICT FORM** Date: November 26, 2019 Time: 8:00 a.m. Judge: Hon. Edward M. Chen Courtroom: 5, 17th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

INTRODUCTION

The government has presented ample evidence that defendant participated in the charged price-fixing conspiracy, and the Court should deny defendant's motion for judgment of acquittal under Rule 29. The premise of defendant's motion appears to be that the government did not present sufficient evidence of a separate, "freestanding" agreement between defendant and Chicken of the Sea CEO Shue Wing Chan. (Trial Tr. at 2456:24.) This premise is incorrect, on multiple fronts. ***First***, the evidence presented at trial readily permits a jury to find beyond a reasonable doubt that defendant participated in the charged price-fixing conspiracy—with or without consideration of defendant's interactions with Chan. ***Second***, the evidence does not support defendant's contention that Chan and defendant's interactions were wholly separate and apart from the rest of the conspiracy, and evaluating isolated portions of the government's evidence in piecemeal is an inappropriate use of Rule 29. ***Third***, the jury is entitled to consider defendant's interactions with Chan as probative evidence of his participation in the broader price-fixing conspiracy—the one for which he has actually been charged—and should be permitted to do so without instructions on how to interpret that evidence in isolation. As the Court has already held, the jury need not find that Chan joined the conspiracy to find defendant guilty.

Defendant likewise is not entitled to additional jury instructions or a special verdict form based on the evidence presented pertaining to Chan. The jury need not unanimously find that Chan (or Chicken of the Sea) was part of the charged price-fixing conspiracy so long as they unanimously find that Bumble Bee conspired with StarKist and that defendant participated.[1] Defendant cannot claim prejudice from the introduction of evidence of his interactions with Chan, because regardless of whether Chan and defendant agreed to fix prices, the jury reasonably could conclude that defendant's interactions with Chan furthered the charged conspiracy and confirm his knowing participation in it. Because the Court will instruct the jury that, in order to

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[1] Conversely, should the jury unanimously find that Chicken of the Sea conspired with Bumble Bee and defendant participated, the jury need not unanimously find that StarKist participated in the conspiracy.

convict, they must unanimously find the defendant guilty of the charged conspiracy, a special verdict form is unnecessary.

ARGUMENT

I. The Court Should Deny Defendant's Rule 29 Motion

A. Legal Standard

A defendant may move for a judgment of acquittal at the close of the government's evidence.[2] Fed. R. Crim. P. 29(a). "There is only one ground for a motion for judgment of acquittal. This is that 'the evidence is insufficient to sustain a conviction' of one or more of the offenses charged in the indictment or information." *United States v. Crowe*, 563 F.3d 969, 972 n.5 (9th Cir. 2009) (quoting 2A Charles A. Wright, Federal Practice and Procedure: Criminal § 466, at 299 (3d ed. 2000)). Accordingly, a Rule 29 motion "is not the proper vehicle for raising an objection to jury instructions." *Id.* at 972 n.5. Nor is a Rule 29 motion a vehicle to strike evidence presented at trial. *See id.*; *see also United States v. Cooper*, No. 14-CR-228, 2016 WL 4087109, at *5, n.40 (D. Nev. Jul. 29, 2016) ("[Defendant's] remaining arguments challenge various evidentiary rulings that are not addressable under Rule 29, which considers only the sufficiency of the evidence presented at trial.").

When considering a motion for a judgment of acquittal, courts must view the evidence presented at trial in "the light most favorable to the prosecution." *United States v. Mosley*, 465 F.3d 412, 415 (9th Cir. 2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). If "*any* rational trier of fact [w]ould…find[] each essential element of the crime beyond a reasonable doubt," the Rule 29 motion must be denied. *Id.* (emphasis in original). Put otherwise, a Rule 29 motion must fail unless ***all*** rational fact finders would have to conclude that the evidence of guilt fails to establish every element of the crime beyond a reasonable doubt. *Id.*

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[2] A court may defer ruling on a motion for a judgment of acquittal until after the jury returns a verdict. Fed. R. Crim. P. 29(b). This preserves the ability of the government to appeal the district court's ruling without violating the Double Jeopardy Clause. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977).

Moreover, "it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts." *United States v. Rojas*, 554 F.2d 938, 943 (9th Cir. 1977) (citations omitted). And "[j]uries have broad discretion in deciding what inferences to draw from the evidence presented at trial." *United States v. Ramirez*, 714 F.3d 1134, 1138 (9th Cir. 2013) (internal quotation marks and citation omitted).

B. The Government Has Presented Sufficient Evidence of the Charged Conspiracy

The Court should deny defendant's motion because the government presented ample evidence of defendant's participation in the charged conspiracy. The indictment charged defendant with conspiring with unnamed coconspirators to fix prices for packaged seafood. (Dkt. No. 1 ¶ 7.) Defendant does not appear to contest the sufficiency of the government's evidence that a price-fixing conspiracy existed between Bumble Bee and StarKist, or that defendant participated in the conspiracy. For that reason alone, the Court should deny defendant's motion. But to the extent defendant does contest the sufficiency of that evidence, his claim must fail.

The evidence presented showing the existence of a Bumble Bee-StarKist conspiracy, and defendant's participation therein, was overwhelming. Bumble Bee executive Scott Cameron testified that in the fall of 2010—at the direction of defendant—he "struck a truce" with StarKist executive Chuck Handford, agreeing that if Bumble Bee refrained from attacking chunk light and pouch tuna, StarKist would stop attacking Bumble Bee's solid white share. (Trial Tr. at 529:6-530:16.) Cameron testified that he continued talking with Handford and reaching agreements about pricing until Handford left StarKist in the fall of 2011. (Trial Tr. at 808:8-19.) Likewise, Bumble Bee executive Kenneth Worsham testified that he began coordinating pricing with Handford starting with the list price increase announced by both companies in March 2011 and continued to coordinate guidance and promotional price points with Handford. (Trial Tr. at 1575:12-1587:7.) Worsham also testified that beginning in November 2011, he communicated with Steve Hodge of StarKist to coordinate prices. (Trial Tr. at 1641:1-20.) Worsham explained

that he agreed with Hodge that neither Bumble Bee nor StarKist would offer 10-for-$10 promotions. (Trial Tr. at 1642:14-19.) Like Cameron, Worsham implicated defendant, explaining that defendant "knew exactly what I was doing." (Trial Tr. at 1530:25.) Hodge corroborated Worsham, testifying that he and Worsham coordinated pricing guidance decisions until Hodge was terminated from StarKist in December 2013. (Trial Tr. at 1323:9-23.)

The government also presented ample evidence that Chicken of the Sea (COSI) was part of the price-fixing conspiracy. Worsham testified that he conspired to fix prices with Mike White of COSI and that he informed defendant about his discussions and agreements with White. (Trial Tr. at 1527:23-25; 1531:4-16; 1675:11-16.) StarKist's Hodge testified to reaching pricing agreements with COSI's White as well. (Trial Tr. at 1326:17-1327:1.) Cameron likewise testified that he coordinated with Hubert Tucker of COSI to implement the January 2012 list price increase. (Trial Tr. at 650:14-651:18.) Cameron explained that he received assurance from Tucker that COSI would follow Bumble Bee's list price increase. (Trial Tr. at 651:17-18.)

Additionally, the government presented evidence that following the price increases by StarKist and Bumble Bee in the summer and fall of 2011, Bumble Bee (and defendant) considered COSI's pricing to be too low. (*See, e.g.*, Government's Trial Exhibit ("Trial Ex.") 198 ("This is the kind of activity we are seeing broadly from COSI at a time when we see SK starting to act more rationally.").) Defendant sent his first email jab to Shue Wing Chan in November 2011. (Trial Ex. 627.) Chan testified that he repeatedly spoke with defendant between November 2011 and the middle of 2013. (Trial Tr. at 2266:22-2267:21.) Chan testified that during a breakfast meeting in March 2012, after receiving complaints from defendant about COSI's pricing, he assured defendant that COSI would not promote aggressively. (Trial Tr. at 2239:10-22.) Chan also stated that he had an understanding that Bumble Bee would refrain from doing so as well. (Trial Tr. at 2240:20-25.)

Based on the foregoing, and the other evidence presented at trial, a rational jury could find that defendant participated in the charged price-fixing conspiracy—a conspiracy between Bumble Bee and at least one other tuna company. (Dkt. No. 495 at 1.) *See Mosley*, 465 F.3d at 415; *see also Esco Corp. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965) ("It is not

necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement.") (citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948)). Therefore, the Court should deny defendant's Rule 29 motion.

C. The Chan-Lischewski Evidence Is not a "Freestanding Agreement"

Moreover—and contrary to defendant's contention that the Lischewski-Chan interactions were a "freestanding agreement"—the evidence presented at trial shows that defendant's interactions with Chan were part of the broader, charged conspiracy. A single conspiracy may include "subgroups or subagreements and the evidence does not have to exclude every hypothesis other than that of a single conspiracy." *United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996) (citing *United States v. Patterson*, 819 F.2d 1495, 1502 (9th Cir. 1987)). Likewise, the "performance of separate acts in furtherance of a conspiracy is not inconsistent with a single overall agreement." *United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir. 1980) (internal quotation marks and citation omitted). Additionally, members of the conspiracy "need not know every other member nor be aware of all acts committed in furtherance of the conspiracy." *United States v. Taren-Palma*, 997 F.2d 525, 530 (9th Cir. 1993), *overruled on other grounds*.

Here, Chan testified that he knew Mike White received pricing information about competitors and understood that in order to obtain such information, White would have had to provide COSI's pricing information. (Trial Tr. at 2272:20-2273:17.) Furthermore, while Chan did not explicitly tell others at COSI about his agreement with defendant (Trial Tr. at 2393: 1-4), ***defendant*** certainly told others about his communications with Chan. Both Cameron and Worsham testified that they were aware that defendant communicated with Chan about prices. For example, Cameron testified that defendant told him about a conversation he had with Chan, in which Chan said COSI was "getting religion" on pricing. (Trial Tr. at 663:13-14; *see also* Trial Ex. 304 ("ShuWing made it a point to tell Chris that they are getting religion in q3…I saw him pull Chris aside to make that point.").) Cameron was also blind copied on an email from defendant to Chan, in which defendant complained about COSI's prices. (Trial Tr. at 659:6-

660:7.) And Worsham testified that defendant's communications with Chan continued after Worsham's contact at COSI, Mike White, had been demoted. (Trial Tr. at 1775:5-1776:3.)

Whether the evidence of defendant's interactions with Chan, standing alone, could sustain a price-fixing conviction is immaterial because defendant was charged with a single, overarching conspiracy.[3] This Court has repeatedly and correctly held that an action need not be illegal in and of itself to further the conspiracy. (*See, e.g.*, Dkt. No. 177 at 6 n.2 ("As the Court has explained herein, a means of furthering a conspiracy can be lawful.").) As explained above, the government has presented ample evidence for the jury to infer that defendant's interactions with Chan were part of the charged price-fixing conspiracy.

D. The Government is Not Required to Show Chan or COSI Joined the Conspiracy in Order to Obtain a Guilty Verdict

The government has presented sufficient evidence that COSI—and Chan in particular—joined the charged price-fixing conspiracy. But, as the Court already held, even if the government had not done so, the government is not required to prove a three-company conspiracy in order to convict. (Dkt. No. 495 at 8.) Thus, the Court has already rejected the premise of defendant's Rule 29 motion. Even if some members of the jury believe Chan or COSI *did not* join the conspiracy, the jury can still return a guilty verdict so long as they unanimously find that the defendant participated in a price-fixing conspiracy between Bumble Bee and StarKist. (*See id.* ("While this Court found proof of an industry-wide conspiracy by preponderance of the evidence in ruling on the admissibility of coconspirator statements, ***the jury***

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[3] As explained above, Chan testified that he assured defendant that COSI would not promote aggressively, (Trial Tr. at 2239:10-22), and understood that Bumble Bee would refrain from doing so as well. (Trial Tr. at 2240:20-25.) The Ninth Circuit recognizes that in a price-fixing conspiracy, "[a] knowing wink can mean more than words." *Esco Corp.*, 340 F.2d at 1007. Accordingly, "[a]n exchange of words is not required" for a jury to infer a price-fixing agreement. *Id.* at 1008 (citation omitted). The fact that pricing complaints were primarily one way, from Lischewski to Chan, does not make the government's evidence insufficient—certainly not as a matter of law. Here, COSI's pricing was perceived to be too low in relation to Bumble Bee's. Even if a jury believed that the agreement between Chan and Lischewski was about COSI's pricing, it would be an agreement between rival CEOs that one company would raise its prices—that one company would bring its pricing into line with the other's.

could find only a two-company conspiracy based on the higher standard of proof beyond a reasonable doubt.").)

The Court's ruling regarding the scope of the alleged conspiracy is law of the case and forecloses defendant's Rule 29 motion. The Court appropriately rejected the "novel theory" of law requested by defendant in which "th[e] failure to prove every alleged coconspirator guilty vitiates the entire criminal case." (*Id.* at 5 n.2 (citing *United States v. Tones*, 759 F. App'x 579, 584 (9th Cir. 2018).) The Court need not revisit its earlier opinion or accept a similarly novel theory of Rule 29. The government has presented sufficient evidence that Chan and COSI were members of the conspiracy. But the jury can convict defendant without unanimously agreeing that Chan or COSI participated.[4]

II. The Court Should Not Instruct the Jury on How to Interpret the Evidence Concerning Chan

A. The Government Presented Sufficient Evidence for the Jury to Infer that Defendant's Interactions with Chan Were Part of the Charged Conspiracy

Defendant has not provided any authority for the proposition that the Court should instruct the jury that particular testimony about a particular transaction or series of transactions was insufficient as a matter of law for the jury to consider. Indeed, "[j]uries have broad discretion in deciding what inferences to draw from the evidence presented at trial." *Ramirez*, 714 F.3d at 1138 (internal quotation marks and citation omitted). "A judge may not preclude the jury from drawing any inferences that it may legitimately draw." *Id.* at 1139.

Here, Chan testified that after receiving complaints from defendant about COSI's pricing, he assured defendant that COSI would not promote aggressively. He further testified that he had an understanding that Bumble Bee would refrain from doing so as well. (Trial Tr. at 2239:10-22; 2240:20-25.) Cameron testified that he knew defendant was communicating with Chan about prices. (Trial Tr. at 510:1-7 ("Q. How did the defendant participate in the conspiracy? A. He directed us to do it. He knew who we were talking to. Q. Did he participate

[4] In fact, here, unlike *Tones* and the hypothetical posed by the Court in its ruling, neither COSI nor Chan are named as coconspirators in the indictment. Thus, as the Court recognized, even if the government proved a two- rather than three-company conspiracy, no variance would result—much less a prejudicial variance. (*Id.* at 8-9.)

in this in any other ways? A. Yes. He talked to competitors as well. Q. Who did he talk to? A. Shue Wing Chan.").) So did Worsham. (Trial Tr. at 1771:1-9; 1778:23-25 ("Chris had the opportunity to, you know, speak directly with Shue Wing and took advantage of it.").)

Based on this evidence, a rational jury could infer that defendant and Chan reached a price-fixing agreement as part of the broader, ongoing agreement among the three companies. *See Esco Corp.*, 340 F.2d at 1008 ("Mutual consent need not be bottomed on express agreement, for any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy.") (citing *United States v. Twentieth Century-Fox Film Corp.*, 137 F. Supp. 78 (S.D. Cal. 1961)).

But even if the jury somehow could not so infer, the jury could infer that defendant intended to further the price-fixing conspiracy through his communications with Chan. The "nature or scope of a conspiracy 'is a question of fact, not of law, to be determined by the jury.'" *United States v. Lynch*, 903 F.3d 1061, 1072 (9th Cir. 2018) (quoting *United States v. DiCesare*, 765 F.2d 890, 900 (9th Cir. 1985)). Even conduct that is perfectly legal in a vacuum can further the conspiracy. (*See, e.g.*, Dkt. No. 177 at 6 n.2 ("As the Court has explained herein, a means of furthering a conspiracy can be lawful.").)

For example, sending "jabs" about pricing may not be in and of itself illegal. Nor is providing pricing information to a competitor. But that does not justify the Court's instructing the jury about how to evaluate the totality of such evidence or—even more drastically—instructing them that it is legally insufficient or not to consider it. *See Ramirez*, 714 F.3d at 1138 ("It is the jury, not the court, which…weighs the contradictory evidence and inferences, …and draws the ultimate conclusion as to the facts.") (internal quotation marks omitted) (quoting *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944)). An understanding between rival CEOs that one company will bring its pricing up (i.e., that it will price more closely in line with its competitor) is illegal. The Court's Final Proposed Jury Instructions instruct the jury on what constitutes price fixing and what does not, and the jury must remain free to draw all reasonable inferences in evaluating holistically the evidence presented at trial,

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and whether the evidence shows such a conspiracy.[5] (Dkt. No. 454, Instruction No. 40.) The jury will not evaluate the Chan-Lischewski evidence in a vacuum; nor should the Court. As the Ninth Circuit has cautioned, "[a] judge may not preclude the jury from drawing any inferences that it may legitimately draw." *Ramirez*, 714 F.3d at 1139.

B. The Court Is Already Providing Sufficient Instructions to the Jury

Defendant's request for additional jury instructions is especially unwarranted because the Court has already indicated it intends to give ***both*** a multiple-conspiracies instruction and a specific-unanimity instruction, in addition to the Ninth Circuit's standard unanimity instruction. These instructions render any additional instructions unnecessary and potentially confusing.

The government anticipates that defendant will argue that defendant's and Chan's interactions constituted a separate conspiracy. But this is a question for the jury, which will be instructed on single versus multiple conspiracies. *See United States v. Costa*, 947 F.2d 919, 923 (11th Cir. 1991) (citing *United States v. Gonzalez*, 940 F.2d 1413, 1422, 1422 n.17 (11th Cir. 1991)) (observing that courts "strongly favor[] admitting evidence that may or may not relate to the indicted conspiracy and allowing the jury to decide whether the evidence relates to the conspiracy at issue (and thus is relevant evidence) or whether it relates to a separate and unrelated conspiracy (and, consequently, is irrelevant)."). Even if Rule 29 were an appropriate vehicle for challenging the sufficiency of a *portion* of the government's evidence in isolation or its connection to the broader conspiracy (which it is not), the government has put on sufficient evidence that the Chan-Lischewski communications were not separate from the rest of the conspiracy.

Likewise, the Court's specific-unanimity instruction will ensure that defendant will not be convicted unless the jury unanimously agree on a set of facts that are sufficient to sustain a

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[5] Defendant accuses the government of attempting to "blur the distinction" between lawful communications involving pricing and illegal agreements between competitors. (Dkt. No. 543 at 2.) Of course, the Court will provide instructions on the law, but it is for the jury to determine whether the communications regarding pricing between competitors were part of the charged price-fixing agreement. *See Esco Corp.*, 340 F.2d at 1006 ("Were we triers of fact, we might well ask if [there were no price-fixing agreement], what purpose was to be served by a meeting of competitors?").

conviction.[6] The jury need not, however, agree on the particular means and methods that effectuated the conspiracy or the particular identities of defendant's coconspirators.

As discussed above, the evidence presented at trial supports a finding that defendant's interactions with Chan were part of the charged overarching conspiracy. *Bauer*, 84 F.3d at 1560; *see also United States v. Kearney*, 560 F.2d 1358, 1362 (9th Cir. 1977) (The Ninth Circuit has recognized the fallacy of "confus[ing] separate acts at separate times with separate conspiracies. Almost any venture, criminal or legitimate, is analyzable into a series of bits, each of which, in turn, is characterizable as an independent plan or goal."). The Court need not and should not predetermine the probative value or relevance of the Chan-Lischewski evidence for the jury. That is their role, and they should be allowed to perform it.

III. The Court Should Deny Defendant's Request for a Special Verdict Form

A special verdict form is not necessary in this case. "[A]s a rule, special verdicts in criminal trials are not favored." *United States v. Ramirez*, 537 F.3d 1075, 1083 (9th Cir. 2008) (quoting *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998)). The government does not know if defendant intends to supplement his proposed special verdict form. (Dkt. No. 243.) Defendant's current proposed verdict form, however, is not warranted. For example, defendant's proposed verdict form would require the jury to indicate whether a guilty verdict was based on finding that participation in the Tuna the Wonderfish marketing campaign violated the Sherman Act. (*Id.* at 2.) But the Court's Final Proposed Jury Instructions already make clear that the government does not allege that the Tuna the Wonderfish campaign was unlawful. (Dkt. No. 454, Jury Instruction No. 41.) Likewise, defendant's proposed verdict form proposes that the jury indicate whether it unanimously agreed that the single overarching conspiracy existed within the statute of limitations period. (Dkt. No. 243 at 2.) But the Final Proposed Jury Instructions make clear that the jury must find beyond a reasonable doubt that the conspiracy existed within the limitations period. (Dkt. No. 454, Jury Instruction No. 50.) The jury should be presumed

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[6] The government believes that Jury Instruction No. 52, as currently drafted, may be confusing to the jury given the Court's rulings and its other instructions. The government intends to file a proposed revision to this instruction.

capable of following instructions. Defendant's proposed special verdict form is unnecessary, cumulative, and highly confusing.

To the extent defendant proposes a special verdict form requiring the jury to indicate whether they considered the evidence of defendant's interactions with Chan in reaching a verdict, such a verdict form is not warranted. As explained above, the government has presented sufficient evidence for the jury to infer that defendant reached an agreement regarding pricing with Chan, as part of the overall charged conspiracy—or at the very least, that defendant and/or Chan intended to further the charged conspiracy with their interactions.

Moreover, so long as the jury is unanimous that the government has proved the elements of the offense, it need not agree (or specify) which particular pieces of evidence had the most probative value. *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) ("[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.") (quoting *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990)). For example, in *Richardson v. United States*, 526 U.S. 813 (1999), the Supreme Court explained that an element of robbery is force or threat of force, but that a jury could convict so long as they agreed the element was proved even if some jurors concluded the defendant used a knife, and others concluded he used a gun, to create the threat. *Id.* So too here. If the jury finds defendant knowingly participated in the charged conspiracy, it would not matter whether some jurors inferred defendant's knowledge from the testimony of Cameron and Worsham, whereas others inferred his knowledge from the testimony of Chan. Accordingly, no special verdict form is necessary.

CONCLUSION

For the foregoing reasons, the Court should deny defendant's Rule 29 motion and deny his request for additional jury instructions and a special verdict form.

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Dated: November 25, 2019

Respectfully submitted,

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