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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF NEVADA**

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 KRISTOPHER LEE DALLMANN,
19 Defendant.
20

Case No. 2:22-cr-00030-RFB-DJA-1

**DEFENDANTS KRISTOPHER LEE
DALLMANN'S MOTION FOR
MISTRIAL**

21 **Certification:** This motion is timely filed.
22

23 **I. INTRODUCTION**

24 Executives at the Motion Picture Association of America and HBO arrived at legal
25 conclusions that Mr. Dallmann engaged in copyright infringement. The government showed
26 these legal conclusions to the jury during opening statements even though those executives will
never testify at this trial. Furthermore, neither the government nor the Court instructed the jury

1 these legal conclusions were inadmissible. For these reasons and several others, this Court
2 should declare a mistrial. *Arizona v. Washington*, 434 US 497, 515 (1978) (affirming mistrial
3 based on opening statement that referred to inadmissible, “improper and highly prejudicial
4 evidence.”)

5 **II. BACKGROUND**

6 The government provided demonstrative exhibits (contained in a PowerPoint
7 presentation) that it intended to use in opening statements to the Court and the defense teams
8 on Saturday, May 25, 2024.

9 Counsel for Mr. Dallmann notified the government on Monday, May 27, 2024, that they
10 intended to object to the government’s proposed use of the PowerPoint slides and provided a
11 detailed basis for their objections. Later, at the Court’s request, counsel for Mr. Dallmann
12 shared their objections with the Court. Counsel for Mr. Dallmann specifically noted that they
13 would seek a mistrial if the exhibits were permitted to be shown during opening statements. *See*
14 *Exhibit A* (Email to Chambers and Counsel).

15 The parties and the Court discussed the objections on the second day of trial. (ECF No.
16 393 at 5.)

17 **III. LEGAL STANDARD**

18 The trial court enjoys broad discretion to declare a mistrial in order to protect the
19 defendant’s rights. *United States v. Bates*, 917 F.2d 388, 394 (9th Cir. 1990). Four factors guide
20 the exercise of this discretion: “Has the trial judge (1) heard the opinions of the parties about
21 the propriety of the mistrial, (2) considered the alternatives to a mistrial and chosen the
22 alternative least harmful to a defendant's rights, (3) acted deliberately instead of abruptly, and
23 (4) properly determined that the defendant would benefit from the declaration of mistrial?” *Id.*
24
25
26

1 **IV. ARGUMENT**

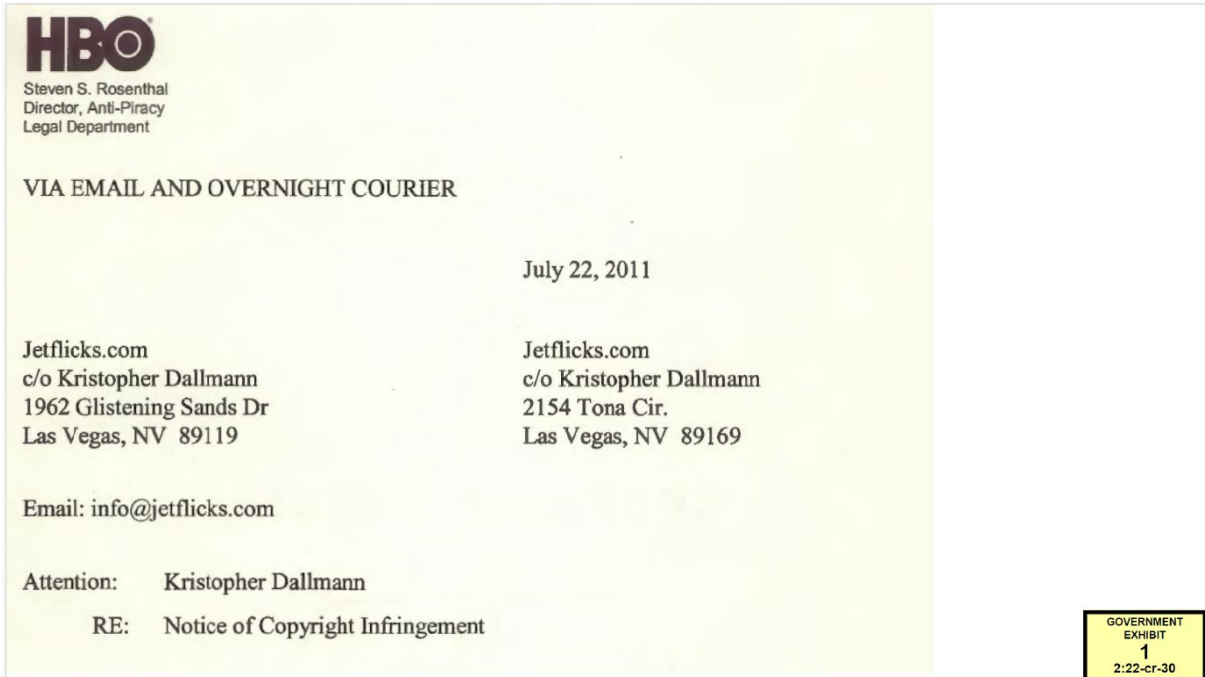
2 **A. A mistrial is warranted because the government was permitted to**
3 **show inadmissible and highly credible legal conclusions to the jury**
4 **during opening statements with no qualification or limiting**
5 **instructions.**

6 “As an officer of the court, the prosecutor has a heavy responsibility both to the court
7 and to the defendant to conduct a fair trial, which includes not injecting into the trial evidence
8 that is obviously inadmissible.” *United States v. Escalante*, 637 F.2d 1197 (9th Cir. 1980).
9 Thus, a prosecutor may not “refer to evidence of questionable admissibility” during opening
10 statements. *United States v. Novak*, 918 F.2d 107, 109 (10th Cir. 1990); *see also United States*
11 *v. Valencia*, 600 F.3d 389, 410 (5th Cir. 2010) (quoting *Novak*); *Walker v. Wood*, 59 F.3d 177
12 (Table), 1995 WL 383406 (9th Cir. 1995) (unpublished) (“It is generally improper to refer to
13 inadmissible evidence, including evidence admissible for impeachment purposes, during
14 opening statements.”) (citing *United States v. Taren-Palma*, 997 F.2d 525, 532 (9th Cir.1993),
15 overruled on other grounds, *United States v. Shabani*, 513 U.S. 10 (1994)).

16 Here, a mistrial is warranted because the government was permitted to show
17 inadmissible and highly credible legal conclusions to the jury during opening statements with
18 no qualification or limiting instructions.

19 **1. HBO Letter**

20 The following demonstrative exhibit was shown to the jury during opening statements:
21
22
23
24
25
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(Exhibit B, Government's Opening Powerpoint - No Callouts.)

Counsel for Mr. Dallmann objected to the use of this letter in the government's opening statements on hearsay grounds. Undersigned counsel for Mr. Dallmann asserted that the subject line of the letter ("Notice of Copyright Infringement") constituted hearsay because it was offered for the truth of the matter asserted therein—that Mr. Dallmann engaged in copyright infringement. Mr. Dallmann further noted that the sender—Steven Rosenthal—was not noticed as a government witness.

The government responded that the exhibit was offered for its effect on the listener. (ECF No. 393 at 6.)

The Court allowed the exhibit to be shown during opening. (ECF No. 393 at 12.) The Court did not provide a limiting instruction, and the government did not explain that the exhibit was offered only for its effect on Mr. Dallmann. (*Id.* at 128–29.)

A mistrial is warranted because the government was permitted to share an inadmissible and highly credible legal conclusion with the jury during opening statements.

1 The letter contains a legal conclusion in the subject line: “Notice of Copyright
2 Infringement.” While the letter is framed as a notice, it is based on a finding that copyright
3 infringement occurred (otherwise, the letter would not have issued). That finding constitutes a
4 legal conclusion. A lawyer (presumably Steven Rosenthal or someone he supervises) found
5 that copyright infringement occurred and apparently issued a notice to Mr. Dallmann advising
6 him to discontinue.

7 The letter is highly credible. HBO is an American multinational media and
8 entertainment company operating as a unit of Warner Bros. Discovery. Steven Rosenthal was
9 not just any lawyer—he was the Director of Anti-Piracy in HBO’s legal department. There can
10 be no question that someone who has ascended to that position is scrupulous, detail-oriented,
11 and credible. Furthermore, the legal department at HBO is not some ragtag team of vagabonds.
12 It’s the legal department within a massive, flagship American media organization.
13 Consequently, a legal conclusion by HBO’s legal department carries significant weight.

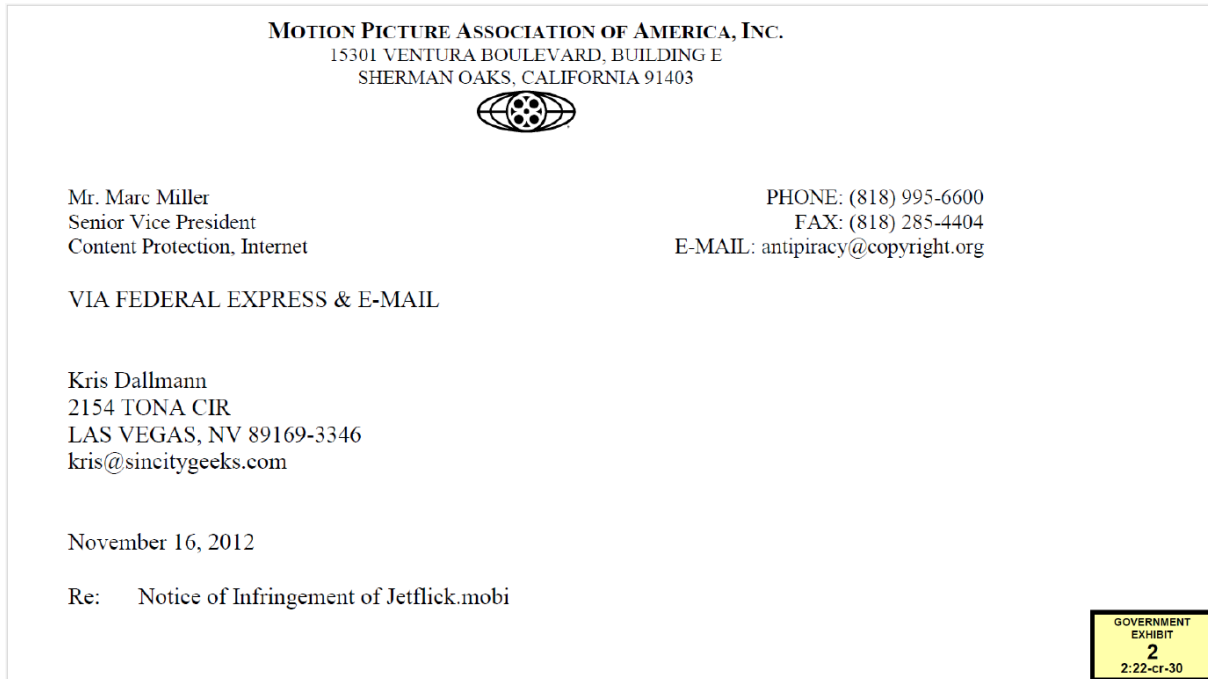
14 HBO’s legal conclusion will not be addressed at this trial by the letter’s author. Steven
15 Rosenthal is not noticed as a government witness, and there is no indication he will testify.

16 The legal conclusion is inadmissible. The jury is the fact finder and must determine for
17 itself whether copyright infringement occurred. Presenting the legal conclusion of Steven
18 Rosenthal and HBO without calling him testify as a witness is a significant problem. It also
19 raises Sixth Amendment concerns—Counsel for Mr. Dallmann cannot cross-examine Mr.
20 Rosenthal and stress-test his legal conclusion.

21 The jury was exposed to an inadmissible, highly credible legal conclusion without
22 qualification or limiting instructions. The legal conclusion presented was that Mr. Dallmann
23 had engaged in copyright infringement. It will be impossible for the jury to disregard the legal
24 conclusion in the letter. Accordingly, no limiting instruction can remedy the problem, and the
25 only solution is to declare a mistrial.

1 **2. MPAA Letter**

2 The following demonstrative exhibit also was shown to the jury during opening
3 statements:



15 (Exhibit B, Government's Opening Powerpoint - No Callouts.)

16 This letter is similarly objectionable. It is a notification of infringement on formal
17 letterhead from a Senior Vice President of a major American media corporation. Any
18 reasonable juror would perceive this letter to have conclusively established that copyright
19 infringement occurred. Nonetheless, the court permitted its use in the government's opening
20 statements because it was offered for its effect on the listener.

21 The problem is that the jurors were unable to distinguish the purpose for which it was
22 shown without instruction to that effect. The jurors were not told this letter was offered solely
23 to show notice. Rather, it was presented in a way that allowed the jurors to perceive that a major
24 America media corporation had conclusively established that copyright infringement had
25 occurred.
26

3. PayPal email

Another demonstrative exhibit is reproduced below:

Your account has been limited until we hear from you

From: service@paypal.com
 To: kristoph@jetflicks.com
 Date: Mon, 24 Oct 2016 09:23:39 -0400

Dear Kris Dallmann,

We have recently reviewed your PayPal account activity and determined that you are in violation of PayPal's Acceptable Use Policy regarding your sales or offers on www.jetflicks.mobi.

Please refer to transaction/s: 2YB09047WY140284N

As a result, your account has been limited temporarily.

To help us resolve this, you will need to:

- Provide us with a valid licensure or proof of authorization to operate your business or to conduct the sales on www.jetflicks.mobi.
 You can send the required documents by fax to: 1-402-537-5774.

The PayPal User Agreement, which you read and accepted when you created your account, states that PayPal, at its sole discretion, reserves the right to limit an account for any violation of the PayPal User Agreement, including the Acceptable Use Policy.

Under the Acceptable Use Policy, PayPal may not be used to send or receive payments for items that infringe or violate any copyright, trademark, right of publicity or privacy, or any other proprietary right under the laws of any jurisdiction.

GOVERNMENT
EXHIBIT
126
2:22-cr-30

(Exhibit B, Government's Opening Powerpoint - No Callouts.)

The government emphasized the highlighted portions of the letter during opening statements by showing them in larger text:

Your account has been limited until we hear from you

From: service@paypal.com
 To: kristoph@jetflixs.com
 Date: Mon, 24 Oct 2016 09:23:39 -0400

Dear Kris Dallmann,

We have recently reviewed your PayPal account activity and determined that you are in violation of PayPal's Acceptable Use Policy regarding your sales or offers on www.jetflixs.mobi.

As a result, your account has been limited temporarily.

To help us resolve this, you will need to:

- Provide us with a valid licensure or proof of authorization to operate your business or to conduct the sales on www.jetflixs.mobi.
 You can send the required documents by fax to: 1-402-537-5774.

The PayPal User Agreement, which you read and accepted when you created your account, states that PayPal, at its sole discretion, reserves the right to limit an account for any violation of the PayPal User Agreement,

Under the Acceptable Use Policy, PayPal may not be used to send or receive payments for items that infringe or violate any copyright, trademark, right

any jurisdiction.

126
2:22-cr-30

(Exhibit B, Government's Opening PowerPoint - Final.)

The email is hearsay, and no PayPal witness has been noticed who can testify about the email. The email is prejudicial because the government used it to establish that Mr. Dallmann had engaged in copyright infringement. The Court offered no limiting instruction when it was presented to the jury, and the government did not explain that it was offered for the limited purpose of showing notice.

B. A mistrial also is warranted based on the introduction of abstracts of statements.

Here, the government used slides labeled Government Exhibits 62A, 182, and 1107 in its opening statements:

Google Account: kristopher.dallmann@gmail.com

Search History Events (All Times in UTC)

Date / Time	Event
2015-11-04 02:19:24	Searched for jetflicks indicted (https://www.google.com/search?q=jetflicks+indicted)
2015-11-04 02:19:29	Searched for jetflicks indictment (https://www.google.com/search?q=jetflicks+indictment)

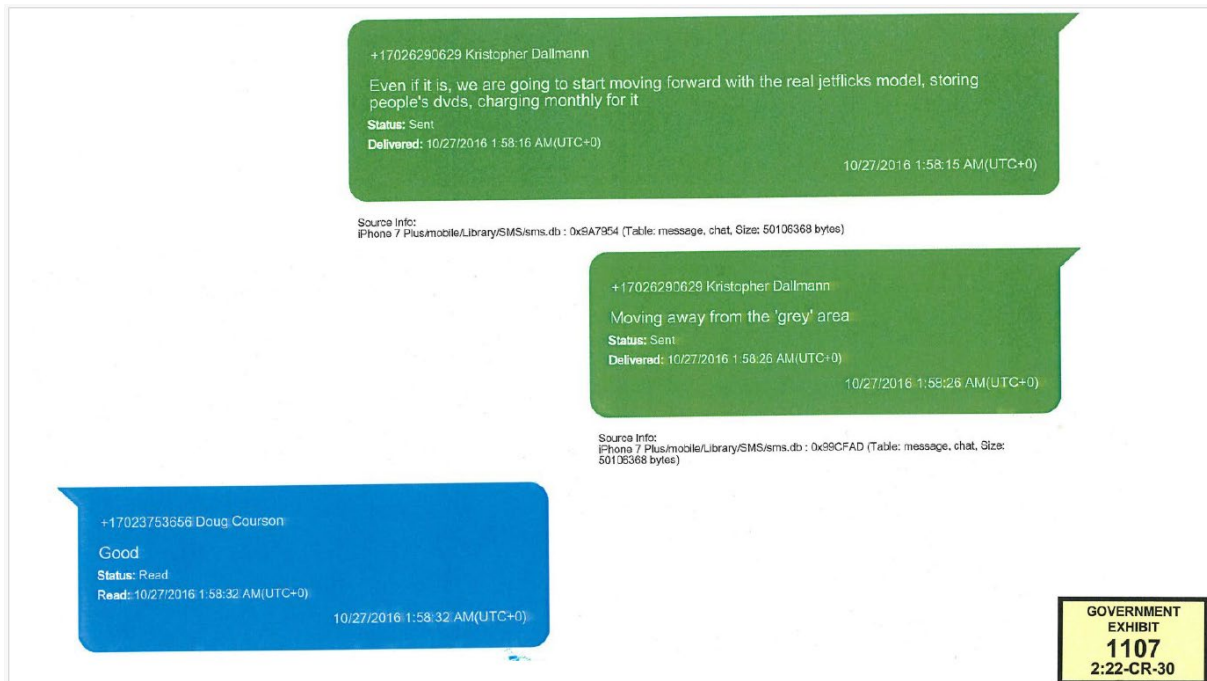
GOVERNMENT
EXHIBIT
62A
2:22-cr-30

Google Account: kristopher.dallmann@gmail.com

Search History Events (All Times in UTC)

Date / Time	Event
2016-10-27 12:44:33	Searched for kristopher dallmann warrant (https://www.google.com/search?q=kristopher+dallmann+warrant)
2016-10-27 12:45:15	Searched for wire fraud punishment (https://www.google.com/search?q=wire+fraud+punishment)
2016-10-27 12:45:39	Searched for wire fraud jetflicks (https://www.google.com/search?q=wire+fraud+jetflicks)
2016-10-27 12:46:37	Searched for fraud jetflicks (https://www.google.com/search?q=fraud+jetflicks)
2016-10-27 12:47:01	Searched for fraud jetflicks (https://www.google.com/search?q=fraud+jetflicks)

GOVERNMENT
EXHIBIT
182
2:22-cr-30



(Exhibit B, Government's Opening Powerpoint - No Callouts.)

The admissibility basis of the slides is unknown since the exhibits lack authentication—including the source of what appears to be a government-made abstract of some other exhibit. In any event, the abstracts are not admissible for several reasons. First, the abstracts would not be admissible evidence since they violate Fed. R. Evid. 106, the Rule of Completeness. Second, the PPT slide abstract be considered admissible as coconspirator statements. For co-defendant statements to be properly admitted, a foundation is required demonstrating: 1) the existence of a conspiracy, 2) the scope and goals of the conspiracy, 3) the defendant's participation in it, and 4) the declarant's participation in it. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 178–79 (1987); *United States v. Larson*, 460 F.3d 1200 (9th Cir. 2006); *see also United States v. Smith*, 441 F.3d 254 (4th Cir. 2006); *United States v. Tellier*, 83 F.3d 578 (2d Cir. 1996) (membership in conspiracy must be established by evidence independent of the statement to be admitted). Third, for a statement to be admitted under Rule 801(d)(2)(E), the declarant and the party against whom the statement is admitted must be a part of the same conspiracy. *United States v.*

1 *Murphy*, 193 F.3d 1, 7 (1st Cir. 1999). Allowing the government to skip its foundational
2 requirements and allow the use of the proposed out of context abstracts of text or email
3 messages would effectively relieve it of its burden of proof and allow the premature admittance
4 of evidence in its opening statement.

5 **CONCLUSION**

6 Mr. Dallmann respectfully requests that the Court declare a mistrial.

7 DATED this 1st day June 2024.

8 RENE L. VALLADARES
9 Federal Public Defender

10 By: /s/ Kevin A. Tate
11 KEVIN A. TATE
12 Litigation Resource Counsel

13 By: /s/ LaRonda Martin
14 LARONDA MARTIN
Assistant Federal Public Defender

15 By: /s/ Rick Mula
16 RICK MULA
Assistant Federal Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that he is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on June 1, 2024, he served an electronic copy of the above and foregoing Motion for Mistrial by electronic service (ECF) to the person named below:

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