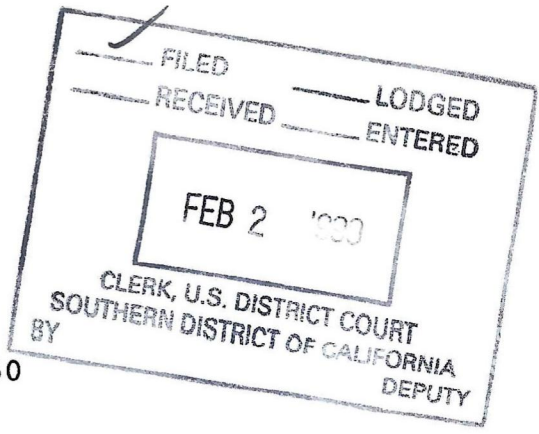


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Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Criminal Case No. 88-0768-K
)	
Plaintiff,)	DATE: February 6, 1990
)	TIME: 9:00 a.m.
v.)	
)	GOVERNMENT'S TRIAL MEMORANDUM
JAVID NAGHDI)	
aka David Naghdi,)	
aka Gregorio Reynolds,)	
aka Khukon Reynolds,)	
)	
Defendant.)	

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, William Braniff, United States Attorney, and Phillip L.B. Halpern, Assistant United States Attorney, and files the attached trial memorandum of facts and law relating to this case.

DATED: February 2, 1990.

Respectfully submitted,

WILLIAM BRANIFF
United States Attorney

PHILLIP L.B. HALPERN
Assistant U.S. Attorney

PLBH:pc
2/2/90

I
STATUS OF THE CASE

A. INDICTMENT

On September 23, 1987, the defendant was originally charged by a grand jury in the Southern District of California with 25-counts of wire fraud in violation of Title 18, United States Code, Section 1343. For trial purposes, the Government has voluntarily agreed to narrow the indictment to nine counts of wire fraud (counts 8, 9, 14-16, 20, 22-24) predicated upon phone calls between the defendant and Agent Supnick.

B. CUSTODY STATUS

After lengthy contested hearings, defendant was extradited from the United Kingdom to face these charges and be sentenced in Los Angeles on a related matter. Upon entering this district, he was detained without bond August 22, 1989 by Magistrate Roger Curtis McKee. Subsequently, he was sentenced to a five year custodial sentence by Judge Manuel Real, Central District of California. Presently, he is being held at the Metropolitan Correctional Center in San Diego, California, pending trial.

C. TRIAL STATUS

Trial is scheduled for February 6, 1990, at 9:00 a.m., before the Honorable Judith N. Keep, United States District Judge for the Southern District of California. The estimated length of the Government's case is approximately one to two weeks.

D. INTERPRETER

The Government does not anticipate that an interpreter will be needed at trial.

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E. JURY WAIVER

The defendant has not filed a jury waiver.

F. PRETRIAL MOTIONS

Defendant has filed pretrial motions to: (1) declare the case complex; (2) transfer venue; (3) dismiss the indictment for lack of venue; (4) dismiss the indictment based on outrageous Government conduct; (5) dismiss the indictment based on alleged grand jury abuse; and (6) suppress statements. The court granted defendant's motion to declare the case complex and placed the outrageous Government conduct motion under submission. All other motions were denied.

Due to the nature of Naghdi's defense ("public authority"), the Court has held a number of hearings regarding the propriety of his subpoenas requesting certain documents and the production of witnesses that could involve the disclosure of classified information. To date, the Government has agreed to the issuance of certain limited subpoenas deuces tecum to a variety of intelligence agencies. Accordingly, the sole remaining subpoena issue is the defendant's right to call various high governmental officials and intelligence officers in his defense.^{1/}

Finally, the Government has repeatedly cautioned the defendant that he must comply with the procedures outlined in the Classified Information and Procedures Act (hereinafter referred to as "CIPA") in presenting his case. Thus far, the Government believes it has not received adequate notice of classified

^{1/} As of February 1, 1990, the Court denied all of Naghdi's Rule 17(b) witness requests.

1 information pursuant to CIPA Section (5). Therefore, as outlined
2 in our moving papers filed January 26, 1990, it is the
3 Government's position that the Court should exclude any classified
4 information proffered during trial.^{2/}

5 II

6 STATEMENT OF THE FACTS

7 In approximately January 1987, defendant Javid Naghdi began
8 obtaining the equipment, raw materials, bottles, caps, packaging
9 materials and inserts necessary to produce counterfeit Naprosyn
10 375 mg.^{3/} Upon obtaining a high speed tablet press, bulk raw
11 materials, coloring agents and a "tool and dye" (for imprinting
12 a trademark on the tablets), Naghdi and two coconspirators
13 produced and sold counterfeit Naprosyn tablets to various drug
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21 ^{2/} On February 1, 1990, the Government received Defendant's
22 long awaited Section 5 notice. This notice, in addition to being
23 untimely, is patently insufficient under the Classified
24 Information Procedures Act and the authorities cited in the
25 Government's moving papers. In fact, it constitutes no notice at
26 all.

27 ^{3/} Naprosyn is an anti-inflammatory prescription drug
28 approved by the United States Food and Drug Administration
(hereinafter referred to as "FDA"), for distribution in the United
States by Syntex (U.S.A.), Inc. (hereinafter referred to as
"Syntex"). It is manufactured by Syntex Puerto Rico, Inc. in the
form of orange, rectangular-shaped tablets that are marked with
the number "273" on one side and "SYNTEX" on the other. Naprosyn
is primarily used to treat severe arthritis.

1 distributors in California in February and March 1987.^{4/} One of the
2 distributors was Robert Lax of Sharp Drug Service, Inc., dba Medi-
3 Surg Medical Supplies (hereinafter referred to as "Medi-Surg"),
4 1319 South LaBrea Avenue, Los Angeles, California

5 In approximately February 1987, the defendant was introduced
6 to Lax as a potential investor in a private venture. At their
7 initial meeting, Naghdi told Lax that he owned a wholesale
8 pharmaceutical company in Nevada and could obtain 375 mg bottles
9 of Naprosyn (500 tablets per bottle). Naghdi told Lax that his
10 company could obtain the Naprosyn well below market value because
11 it purchased millions of dollars worth of the drug at a time.

12 Eventually, Lax agreed to purchase substantial quantities of
13 Naprosyn as long as he was assured that the drugs came from
14 Syntex. In this regard, Mr. Lax contacted a number of his
15 customers to determine their interest in Naghdi's Naprosyn. On
16 or about February 26, 1987, Lax made the first of three purchases
17 of counterfeit Naprosyn from defendant's alleged pharmaceutical
18 company, North Western Wholseler [sic], 1543 West Charleston,
19 Blvd., Las Vegas, Nevada. In total, Lax purchased approximately
20 \$83,000.00 worth of the Naprosyn from Naghdi.

23 ^{4/} The counterfeit Naprosyn substituted aspirin and
24 acetaminophen in place of the active ingredients, 6-methoxy-alpha-
25 methyl-2-naphthaleneacetic acid and 6-methoxy-alpha-methyl,
26 contained in the genuine product. However, the counterfeit
27 tablets did bear coloring and markings similar to the authentic
28 product, were packaged in similar bottles, were labeled with
counterfeit labels and boxed in counterfeit cartons. Naghdi
falsely alleged that this product was genuine Naprosyn,
manufactured by Syntex Laboratories, Inc. (hereinafter referred
to as "Syntex").

1 Lax sold the majority of Naghdi's counterfeit Naprosyn to
2 Gene Alley of Stat Pharmaceutical, 1981 Main Street, San Diego,
3 California (hereinafter referred to as "Stat"). Mr. Alley
4 purchased three lots of Naprosyn for approximately \$107,000.00.
5 In turn, Stat resold the drugs to a number of accounts, including
6 Dutch Village Drug, Inc., 4120 East South Street, Lakewood,
7 California.^{5/} The invoice reflecting the Dutch Village sale was
8 dated March 16, 1987.

9 In addition to Lax, Naghdi also sold counterfeit Naprosyn to
10 Sid Chakravarti, a pharmaceutical salesperson. In early
11 March 1986, Chakravarti and two other businessmen, entered into
12 an international marketing agreement with the defendant. This
13 marketing agreement called for Naghdi International, Inc., to
14 provide up to seven hundred thousand (700,000) bottles of Naprosyn
15 (at \$175.00 per bottle) for international export. Naghdi indicated
16 that the Naprosyn would be available in the near future.^{6/} Prior
17 to delivery, Naghdi was arrested on a criminal complaint filed in
18 the Central District of California.^{7/}

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21 _____
22 ^{5/} This Naprosyn was picked up by an FDA inspector and
23 taken to the FDA laboratory in Los Angeles for analysis. The
24 FDA's analysis revealed that the Naprosyn did not contain the
25 active ingredient naproxen.

26 ^{6/} On February 9, 1987, Mallinckrodt, Inc., a chemical
27 manufacturer, shipped over ten thousand pounds of acetaminophen
28 to Naghdi International, Inc. This shipment was paid for by a
check issued on the personal account of Dr. Javid Naghdi.
According to an FDA analysis, this shipment would be sufficient
to produce millions of tablets of counterfeit Naprosyn.

^{7/} The parties withdrew from the marketing agreement upon
learning of Naghdi's arrest.

1 On March 27, 1987, a criminal complaint was filed in United
2 States District Court against Javid Naghdi alleging that he was
3 manufacturing and distributing counterfeit Naprosyn. Thereafter,
4 a thirteen-count indictment (No. 87-0368) against Javid Naghdi was
5 returned by a federal grand jury. On June 26, 1987, Naghdi pled
6 guilty to four counts of the indictment charging him with
7 conspiracy, manufacturing and distributing a counterfeit drug and
8 trafficking in goods bearing counterfeit trademarks. District
9 Judge Manuel Real set Naghdi's sentencing for August 3, 1987.^{8/}

10 Following Naghdi's guilty plea, but prior to his sentencing
11 date, defendant was introduced to Milton Polland, President of
12 Central Pacific Assurance, Ltd., Los Angeles, California
13 (hereinafter referred to as "Central Pacific"). At this meeting,
14 Naghdi told Polland that: (1) his family owned a pharmaceutical
15 business known as Naghdi International, Inc. (hereinafter referred
16 to as "Naghdi International"); (2) the business was worth
17 approximately 50 million dollars; and (3) he could buy large
18 quantities of pharmaceuticals at reduced prices from U.S. drug
19 companies.^{9/}

20 During the meeting, Naghdi also told Polland that Naghdi
21 International presently had three million bottles of Tagamet,
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23 ^{8/} On the date of his sentencing, Naghdi failed to appear
and a no-bail arrest warrant was issued by Judge Real.

24 ^{9/} In their discussions, Naghdi concealed from Polland, inter
25 alia, that he was an arrested drug counterfeiter. Among other
26 things, Naghdi also falsely represented that he was a medical
27 doctor with ties to a local hospital. Moreover in order to
28 establish his bona fides, Naghdi gave Polland a fraudulent
certified public accountant's statement indicating that Naghdi
International did millions of dollars in annual business.

1 three million bottles of Anspor, and two million bottles of
2 Naprosyn located in a warehouse in Tampico, Mexico. According to
3 Naghdi, the pharmaceuticals were presently available because a
4 prior sale fell through due to problems with obtaining a letter
5 of credit. Recognizing Polland's business contacts, Naghdi
6 inquired if he would be interested in finding a buyer for the
7 drugs.

8 Following this initial meeting, Milton Polland discussed
9 Naghdi's offer with his son, Peter Polland, Secretary of Central
10 Pacific Assurance, and a business associate, Jack Russell,
11 President of National Benefit Consultants, Inc., Los Angeles,
12 California (hereinafter referred to as "NBC Sales"). Based upon
13 Naghdi's false representations and his fraudulent financial
14 statement, Russell told the Pollands that he was willing to see
15 if he could locate a buyer for the pharmaceuticals. Accordingly,
16 Milton Polland arranged for a meeting to take place between
17 Russell and Naghdi.

18 On or about June 12, 1987, as a result of Milton Polland's
19 introduction, Javid Naghdi went to Jack Russell's office at NBC
20 Sales to discuss the sale of the pharmaceuticals located in
21 Tampico, Mexico. During their discussion, Naghdi maintained that
22 he had three million bottles of Tagamet, three million bottles of
23 Anspor, and two million bottles of Naprosyn for sale. Naghdi
24 stated that a prior deal had fallen through because he could not
25 confirm the buyer's letter of credit, so the drugs were returned
26 to Tampico, Mexico. Throughout this and all subsequent
27 conversations, Naghdi falsely represented that the drugs had been
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1 originally sold to Naghdi International by SmithKline. French,
2 the only legitimate manufacturer of Tagamet and Anspor and Syntex
3 Laboratories, the only legitimate manufacturer of Naprosyn.

4 Based on the lure of substantial potential commissions, Jack
5 Russell, on behalf of Javid Naghdi, contacted several buyers,
6 including Ed Charol of Trading Services Company, Stanford,
7 Connecticut (hereinafter referred to as "TSC"), Doel Garcia of
8 Money Concepts Hispanica, West Palm Beach, Florida, and Jose O.
9 Ponton, Sr., of Able Distributors, Inc., Washington, D.C.
10 (hereinafter referred to as "Able Distributors"). After Charol
11 expressed interest, Jack Russell sent TSC a formal offer from
12 Naghdi International confirming the terms of the transaction.
13 This offer once again falsely indicated that the drugs were
14 legitimately manufactured by SmithKline and Syntex.^{10/}

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16 ^{10/} Although the Government does not intend to go into the
17 details of this transaction, it should be noted that on or about
18 June 18, 1987, upon receipt of Naghdi International's offer, Ed
19 Charol contacted Shuvendu Roy Chowdhury of Belrico Handel und
20 Handelaberatung Gesellschaft M.B.H., Larchenfelder Strasse 15/13,
21 1160, Vienna, Austria (hereinafter referred to as "Belrico"), to
22 discuss finding a buyer for the Tagamet, Anspor and Naprosyn.
23 Following the submission of detailed documentation and personal
24 conversations with Javid Naghdi, Chowdhury sent a delegation to
25 the Government of Iran to negotiate the purchase of the drugs from
26 Naghdi International. Eventually, Chowdhury arranged to sell the
27 drugs to the Iranian Government, Michael R. Machura of
28 International Development and Promotion Company, Ltd., Vordere
Zollamtsstrasse 11, A-1030 Vienna, Austria (hereinafter referred
to as "IDPC"), for \$579,002,292.00 less commissions.

After arranging to sell the drugs to Iran through IDPC, on or
about October 30, 1987, Belrico sent Jack Russell a letter
confirming Belrico's contract with Naghdi International to
purchase the three million bottles of Tagamet, three million
bottles of Anspor and two million bottles of Naprosyn. In order
to negotiate this contract, Naghdi provided numerous forged and
fraudulent documents falsely representing that the drugs were sold
by SmithKline and Syntex to Naghdi International.

(continued...)

1 At the same time Russell was conducting the above
2 negotiations, SmithKline was receiving inquiries about the
3 legitimacy of similar offers regarding the sale of unusually large
4 quantities of Tagamet and Anspor at prices far below the normal
5 wholesale price. One such call was received on or about
6 October 5, 1987, from Michael Barnett, a businessman in
7 Burlington, Washington. Mr. Barnett stated that he had received
8 an offer from Lone Star Distributors to buy three million bottles
9 of Tagamet, three million bottles of Anspor and two million
10 bottles of Naprosyn.

11 Following Barnett's call, SmithKline contacted the FDA and
12 the Federal Bureau of Investigation. SmithKline told both
13 agencies that the company had received suspicious inquiries about
14 the sale of a large quantity of Tagamet and Anspor. The price and
15 quantities of drugs being offered for sale suggested that they
16 might be counterfeit.

17 After being informed of the suspicious inquiries, on
18 October 16, 1987, FDA agents contacted Michael Barnett to obtain
19 more information. After discerning that huge quantities of
20 Tagamet, Anspor and Naprosyn were being offered for sale with
21 false lot numbers and expiration dates, federal agents requested
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24 ^{10/}(...continued)

25 Although a formal contract was entered into by the parties
26 toward the end of 1987, the deal was held up by, among other
27 things, Naghdi's failure to allow for adequate inspection of the
28 pharmaceuticals. When Iran's representative, Michael R. Machura,
traveled to Tampico, Mexico, to inspect the goods, he was denied
access to the warehouse where the drugs were allegedly being
stored. Machura and Jack Russell did, however, inspect the
original documentation for the shipment.

1 that Barnett cooperate in an investigation. Barnett agreed, and
2 subsequently contacted Lone Star to follow up on the offer.

3 When Barnett called Lone Star about the offer he had
4 received, he was told that the original "lot" of Tagamet, Anspor
5 and Naprosyn had already been sold, but that an additional lot of
6 Tagamet would be available around the beginning of 1988. If
7 Barnett wished to purchase this lot, he was instructed to contact
8 Jose Ponton. Subsequently, Barnett contacted Jose Ponton at Able
9 Distributors regarding the deal. Ponton made it clear that Able
10 Distributors would sell no less than one million bottles of
11 Tagamet at a time. Upon instructions from federal agents, Barnett
12 informed Ponton that he was operating as a broker for Dan Saunders
13 of Owens & Minor, Inc., (hereinafter referred to as "Owens &
14 Minor"). Owens & Minor is a legitimate pharmaceutical distributor
15 based in Richmond, Virginia that has been in business for over 100
16 years and is currently listed on the New York Stock Exchange.

17 In mid-February 1988, United States Customs Service Special
18 Agent Daniel Supnick working undercover, contacted Able
19 Distributors. The agent identified himself as Daniel Saunders,
20 the West Coast Representative for Owens & Minor. Eventually,
21 after about two weeks of negotiations, Jose Ponton, on behalf of
22 Able Distributors, entered into a contract to sell one million
23 bottles of Tagamet (allegedly manufactured by SmithKline) to Owens
24 & Minor for 27 million dollars.

25 On or about February 29, 1988, Ponton introduced Supnick to
26 Jack Russell. During their initial conversation, Russell
27 explained that the Tagamet was being sold by Naghdi International,
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1 a company which he described as possessing very strong connections
2 to SmithKline. Russell also relayed Naghdi's claim that Naghdi
3 International was able to obtain Tagamet at such a low price due
4 to the large quantities it purchased from SmithKline.

5 Following their initial conversation, Russell took over the
6 final arrangements and requested that Supnick change the purchase
7 order to reflect Naghdi International as the seller of the
8 Tagamet. Subsequently, Russell sent Supnick the amended purchase
9 order/contract signed by both Naghdi and Russell. Throughout
10 these negotiations with Ponton and Russell, Supnick insisted that
11 Owens & Minor be allowed to sample and test the Tagamet before
12 paying on the letter of credit.

13 In April 1988, Naghdi telephoned Supnick several times.
14 During their conversations, Naghdi falsely represented to the
15 federal agent that SmithKline was selling the Tagamet directly to
16 Naghdi International. Naghdi also falsely stated that SmithKline
17 had to accrue the full consignment of one million bottles, so that
18 he could send Owens & Minor samples bearing the specific lot
19 numbers that SmithKline was allegedly producing for this
20 shipment.^{11/}

21 Between April and August 1988, Naghdi met with Supnick twice
22 and made various telephone calls to him.^{12/} During these

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24 ^{11/} These samples, later delivered to Agent Supnick by Peter
25 Polland, were in fact genuine Tagamet. However, an examination of
26 the lot numbers by company officials revealed that they were not
27 part of a one million bottle shipment to Naghdi International

28 ^{12/} During their initial meeting at the Dorchester Hotel,
London, England, Supnick identified Naghdi, among other ways, from
a picture taken of him at or about the time of his arrest in
Los Angeles in 1987.

1 conversations, Naghdi continued to make numerous false
2 representations regarding the source of the Tagamet. Naghdi also
3 falsely represented that he exported pharmaceuticals from the
4 United States at very low prices because he bought the
5 pharmaceuticals in bulk from American pharmaceutical companies and
6 paid cash for them. During a conversation in May, Naghdi falsely
7 represented that SmithKline had produced 750,000 bottles of Owens
8 & Minor's one million bottle order of Tagamet. Thereafter, in
9 July, he falsely represented that SmithKline had finally shipped
10 all one million bottles to Tampico, Mexico.

11 Due to Supnick's insistence that Owens & Minor required an
12 inspection and testing of the Tagamet, Naghdi never completed the
13 transaction. Initially, Naghdi said that the letter of credit
14 should become effective on June 25 or June 26, the day that the
15 pharmaceuticals would arrive at his bonded warehouse in Tampico,
16 Mexico. When Supnick refused to open the letter of credit on that
17 date, Naghdi asserted that it would have to be opened before the
18 agent could inspect or sample the drugs. Naghdi explained that
19 he wanted the letter of credit to be made payable to him at the
20 moment the agent took possession of the drugs.

21 During the time Naghdi was negotiating the Owens & Minor
22 transaction, he resided as a fugitive in London, England. While
23 carrying out his pharmaceutical swindles from London, he utilized
24 his cancelled Citicorp Diners Club credit card to convey the
25 impression of great wealth. Despite Diners Club attempts to
26 confiscate the card and prohibit its further use, Naghdi

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1 improperly charged \$35,000 in expenses and purchases, primarily
2 at Harrods' gourmet food halls.

3 While in England, Naghdi convinced Polland to guarantee his
4 hotel bill so that Naghdi could continue to reside at the Hotel
5 Intercontinental. Naghdi repeatedly assured Polland that he would
6 actually pay the hotel bill and all related expenses so they would
7 never actually be charged to Polland's American Express card.
8 Naghdi also falsely asserted that he only needed Polland to
9 guarantee his bill because he checked into the Hotel
10 Intercontinental under the assumed name, Gregorio Reynolds.^{13/} He
11 explained that this was necessary due to the pressures related to
12 the pending pharmaceutical deals.

13 On August 4, 1988, based on the San Diego investigation,
14 Magistrate Irma E. Gonzalez issued a complaint in the Southern
15 District of California against Javid Naghdi. This complaint
16 alleged, among other things, that Naghdi was committing wire fraud
17 in this district. The Magistrate also issued an arrest warrant
18 for the San Diego charges at this time.

19 On August 8, 1988, the United States Department of State
20 sent a telex to the American Embassy in London, England
21 instructing them to request a provisional arrest warrant for Javid
22 Naghdi. In order to effectuate the arrest, Agent Supnick arranged
23 to meet Naghdi On August 11, 1988, at room 654 of the Dorchester
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27 ^{13/} In checking into the hotel, Naghdi also apparently
28 relied on a false passport.

1 Hotel. At approximately 3:15 p.m., Naghdi entered Supnick's room
2 carrying a brown briefcase.^{14/}

3 Upon exiting Supnick's room at approximately 4:25 p.m.,
4 Naghdi was arrested by new Scotland Yard on the provisional arrest
5 warrant. He was then immediately taken into room 653 where he was
6 cautioned that anything he said might be "given in evidence." At
7 that time, Naghdi admitted that he was a fugitive from the United
8 States.

9 Inspector Challis of New Scotland Yard transported Naghdi to
10 the Bow Street Police Station. At the station, he inventoried all
11 his possessions. Following this inventory, he maintained
12 possession of his "flat key", his wallet, and his briefcase.^{15/} At
13 approximately 5:15 p.m., Naghdi was escorted to his jail cell by
14 Inspector Challis. At this time, Naghdi professed not to
15 understand what was happening as he had not "done anything wrong
16 in [England]." Among other things, Naghdi stated that "What I am
17 doing now is to get revenge on the people in America, not kill
18 them or anything like that but get revenge. . . ."

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24 ^{14/} During this meeting, Naghdi continued to maintain that
25 the one million bottles of Tagamet were in Tampico, Mexico. In
26 addition, he claimed that ten days earlier, he had sold
approximately three million dollars of Tagamet obtained from
SmithKline.

27 ^{15/} A review of the items contained in Naghdi's wallet and
28 briefcase revealed numerous documents used during his scheme to
defraud.

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II

STATEMENT OF THE LAW

A. ADMISSABILITY OF PRIOR CRIME UNDER
FEDERAL RULE OF EVIDENCE 404(b)

The government intends to offer evidence of defendant Naghdi's participation in a related drug counterfeiting scheme he was engaged in during the time he was planning the fraudulent activity that is the subject of the instant indictment. In that case, the defendant was charged in the Central District of California and pled guilty to four counts of conspiracy, manufacturing and distributing a counterfeit drug, and trafficking in goods bearing counterfeit trademarks. The underlying scheme of the Central District case, is virtually identical to the wrong-doing charged in this case.

Federal Rule of Evidence 404(b) states that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Rule 404(b) is a rule of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove only criminal disposition. United States v. Faust, 850 F.2d 575, 583 (9th Cir. 1988); United States v. Bradshaw, 690 F.2d 704, 708 (9th Cir. 1982), cert. denied, 463 U.S. 1210 (1983). In this case, the government seeks to admit evidence of the prior similar act as it is crucial to demonstrate defendant's knowledge, intent, and planing, as well as, his opportunity to commit the charged offense. Although only one of the above purposes would

1 be sufficient, it should be noted that they are all present in the
2 this case.

3 Evidence of a prior similar act is admissible under Rule
4 404(b) if: (1) there is sufficient proof for the jury to find that
5 the defendant committed the earlier act; (2) the other act was not
6 too remote in time; (3) if used to prove intent, the prior act
7 must be similar; (4) the other act must be used to prove a
8 material issue; and (5) the probative value must outweigh the
9 prejudice to the defendant. Huddleston v. United States, 108
10 S.Ct. 1496, 1499 (1988); United States v. Spillone, 879 F.2d 514,
11 518-20 (9th Cir. 1989).^{16/}

12 In the present case, all the prerequisites for admission of
13 the 404(b) evidence have been satisfied. First, there is no doubt
14 that Naghdi committed the prior similar act. He was charged with
15 the crime and pled guilty to its commission.

16 Second, the earlier act took place close in time to the crime
17 charged in this case. Evidence obtained by the government shows
18 that the defendant initiated the second drug counterfeiting
19 scheme, at the center of the present case, within weeks of
20 pleading guilty to the commission of the first crime involving an
21 identical drug counterfeiting scheme. Indeed, the defendant may
22 have been planning the scheme at issue in this case while he was
23 engaged in the earlier drug counterfeiting scheme.

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26 ^{16/}See also United States v. Miller, 874 F.2d 1255, 1269 (9th
27 Cir. 1989); United States v. Ross, 886 F.2d 264, 267 (9th Cir.
28 1989); United States v. Brown, 873 F.2d 1265, 1267 (9th Cir.
1989).

1 Third, the acts are virtually identical to one another. While
2 the similarities are legion, the most important similarities for
3 purposes of showing defendant's knowledge, intent, and plan are
4 Naghdi's false representations in both cases that he worked for
5 a large pharmaceutical company, his use forged documents to
6 convince people that the counterfeit drugs were authentic, and his
7 statements to potential purchasers in both cases that he could
8 sell the drugs below market value because his company bought large
9 quantities of the drugs directly from the authorized
10 manufacturer.^{17/}

11 Fourth, it is undeniable that the evidence will be used to
12 prove a material issue at trial. Indeed, Naghdi's entire defense
13 appears to be predicated on his claim that he was relying on
14 government authority. Accordingly, he did not possess the
15 necessary intent to defraud prospective purchasers out of millions
16 of dollars by selling them counterfeit prescription
17 pharmaceuticals.^{18/} It is therefore vital that the Government be
18 allowed to introduce evidence of his participation in the prior
19 drug counterfeiting scheme to demonstrate the defendant's true

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^{17/} Also striking is the fact that defendant was attempting
24 to sell 700,000 bottles of counterfeit Naprosyn, immediately
25 before his discussions with the Pollands. Only after his initial
26 purchasers learned of his arrest, did the defendant turn to the
27 victims in the present case.

28 ^{18/} Naghdi made intent an issue in this case by entering a
plea of "not guilty" and notifying the government that he intends
to use reliance on governmental authority as a defense to the
charges against him.

1 knowledge, intent, and plan in committing the crimes charged in
2 this case.^{19/}

3 The acts committed by the defendant in the commission of the
4 previous counterfeiting scheme clearly demonstrate that he had the
5 ability and the expertise to manufacture phony prescription
6 pharmaceuticals out of cheap, inactive bulk ingredients. It also
7 shows that defendant knew how to package and distribute the phony,
8 counterfeit drugs so wholesalers, pharmacists, and consumers would
9 believe they were purchasing the genuine article.^{20/}

10 The Ninth Circuit was confronted with a similar situation in
11 United States v. Nadler, 698 F.2d 995, 1000 (9th Cir. 1983). In
12 Nadler, a case involving a scheme to counterfeit federal reserve
13 notes, the District Court admitted testimony regarding a previous
14 counterfeiting operation. The Court reasoned that the evidence
15 of the prior operation was relevant to prove the defendant's
16 "intent to commit the crime as well as his knowledge of the
17 counterfeiting activity, to show that a common counterfeiting
18 scheme was involved in both operations, and as evidence of the
19 background and development of the conspiracy." In Nadler, the
20 defendant was not even charged with the prior counterfeiting
21 scheme, the instant case presents a far more compelling case for
22 the admission of the prior similar acts.

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25 ^{19/} Moreover, if defendant persists in his government
26 authority defense, the prior similar acts can be used to rebut
27 such defense. Further, the prior acts also demonstrate that
28 defendant did possess the opportunity to commit the charged
crimes.

^{20/}

1 Finally, the probative value of the 404(b) evidence easily
2 outweighs any prejudice to the defendant. At the outset, it must
3 be noted that the charged conduct is far more egregious than the
4 defendant's prior act. It is hard to imagine how a jury could be
5 prejudiced by a hundred thousand dollar counterfeiting operation
6 when defendant is being charged in this case with a 27 million
7 dollar fraud.

8 On balance, consideration of all the foregoing factors weighs
9 in favor of admitting the evidence of the prior crime. The jury
10 should be able to dispassionately evaluate the relevance of the
11 prior acts as they relate to the defendant's knowledge, intent,
12 plan, and opportunity to commit the crime charged in this case.
13 If necessary, the court may also give a limiting instruction to
14 minimize any prejudicial effect. United States v. Miller, 874
15 F.2d at 1268.

16 Therefore, as we believe each prerequisite for introduction
17 of the prior crime under Rule 404(b), the government plans to call
18 several witnesses from the prior counterfeiting case to begin the
19 trial. These witnesses will be ready to testify Tuesday morning
20 and should take no more than two hours.

21 B. DEFENDANT'S AFFIRMATIVE DEFENSES

22 As the Court is well aware, defendant has informed the Court
23 that he intends to assert a defense based on reliance on public
24 authority pursuant to Federal Rule of Criminal Procedure 12.3.
25 The validity of the so called "apparent authority" or "CIA"
26 defense, that has also been couched in terms of "good faith
27 reliance," "lack of intent," and "mistake of law," has not been
28

1 examined by the Ninth Circuit. Other Circuits, however, have held
2 that a mistaken belief that an alleged government official had
3 apparent authority to sanction a federal crime is not a valid
4 defense. United States v. Anderson, 872 F.2d 1508, 1515 (11th Cir.
5 1989); United States v. Duggan, 743 F.2d 59, 83 (2d Cir. 1984);
6 United States v. Kelly, 718 F.2d 661, 665 (4th Cir. 1983). See
7 also United States v. Rosenthal, 793 F.2d 1214, 1235-37 (11th Cir.
8 1986); and United States v. Wilson, 721 F.2d 967, 975 (4th Cir.
9 1983).

10 It is well-settled that ignorance of the law or mistake as to
11 the law's requirements is not a defense to criminal conduct.^{21/}
12 United States v. International Minerals and Chemicals Corp., 402
13 U.S. 558, 563 (1971); United States v. Rosenthal, 793 F.2d at
14 1235; United States v. Duggan, 743 F.2d at 83. Thus, even if the
15 defendant was led to believe, by someone he allegedly thought was
16 a CIA agent, that his drug counterfeiting scheme was part of an
17 intelligence operation, he would still be guilty of the crime
18 charged in the indictment.

19 A defendant may only be exonerated on the basis of his
20 reliance on real, not apparent, or imagined government authority.
21 United States v. Wilson, 721 F.2d at 975; United States v.
22 Anderson, 872 F.2d at 1515; United States v. Duggan; 743 F.2d at
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25 ^{21/} The narrowly drawn exceptions to this rule are (1)
26 legitimate reliance on an official interpretation of law, and (2)
27 response to a police officer's call for assistance in making
28 arrests or conducting searches. United States v. Rosenthal, 793
at 1235; United States v. Duggan, 745 F.2d at 83. Neither
exception is applicable in this case.

1 83-84; United States v. Rosenthal, 793 F.2d at 1235.^{22/} Mere
2 reliance on an officials claimed status is not sufficient to
3 establish a valid defense. Moreover, even if the defendant was
4 actually cooperating with real CIA agents, his criminal conduct
5 would not be excused. Officials of the CIA or any other
6 intelligence agency of the United States do not have the authority
7 to authorize conduct that would violate federal law.^{23/} Exec.
8 Order No. 12333, 3 CFR 200 (1982); United States v. Anderson, 872
9 F.2d at 1515; United States v. Rosenthal, 793 at 1236; United
10 States v. Barker, 546 F.2d at 962.

11 Because the CIA could not have authorized Naghdi to violate
12 the law, defendant's theory that he was acting on the apparent
13 authority of the CIA is not a viable defense.^{24/} United States v.

14 _____
15 ^{22/} The most expansive view of "the CIA defense" was set
16 forth in Judge Wilkey's individual opinion in United States v.
17 Barker, 546 F.2d 940, 949 (D.C. Cir. 1976). Judge Wilkey's
18 opinion, departing from precedent, proposed to recognize a defense
19 based on reliance on apparent authority, requiring a showing of
20 both (1) facts justifying the defendant's reasonable reliance on
21 the apparent authority and (2) a legal theory upon which to base
22 a reasonable belief that the government official possessed such
23 authority. The exception espoused by Judge Wilkey received but
one vote and thus cannot be viewed as the rationale of the Court.
Moreover, every court that has examined the validity of "the CIA
defense" since Barker has declined to adopt Judge Wilkey's view
that a defendant may be exonerated on the basis of his reliance
on an authority that was apparent and not real. See United
States v. Duggan, at 84; United States v. Rosenthal, 793 F.2d at
1235; United States v. Wilson, 967 F.2d at 975; United States v.
Anderson, 872 F.2d at 1516.

24 ^{23/} Whether even the President or the Attorney General can
25 authorize violations of the United States Constitution or statutes
is a matter of dispute. See United States v. Barker, 546 F. 2d
at 950.

26 ^{24/} If this were not the case, private citizens could be
27 employed to do the government's "dirty work," and then be shielded
28 from responsibility by maintaining that they had been recruited
by a government agent. As stated in United States v. Wilson, 721

(continued...)

1 Anderson, 872 F.2d at 1515; United States v. Rosenthal, 793 F.2d
2 at 1236. Accordingly, this Court would be well within its
3 discretion to find that defendant's CIA theory is not a viable
4 defense and limit evidence on the defense that may be introduced
5 at trial, or refuse to instruct the jury on the defense. United
6 States v. Rosenthal, 793 F.2d at 1236; (denial of defendant's
7 requested instruction on "the CIA defense" on the ground that
8 there was insufficient evidence to justify it, upheld); United
9 States v. Anderson, 872 F.2d at 1515 (district court properly
10 exercised its discretion in excluding evidence offered by defense
11 which, if believed, fails to establish a legally cognizable
12 defense); United States v. Duggan, 743 F.2d at 84 (defendants'
13 failed to establish they were entitled to a jury instruction on
14 any defense based on an exception to the general principle that
15 a mistake of law is no defense); United States v. Wilson, 721 F.2d
16 at 974 (district court properly denied defendant's requested
17 instruction on the "good faith reliance" defense on the ground
18 that there was insufficient evidence to justify it.)

19 It would also be proper for this Court to exclude evidence of
20 defendant's "CIA defense" because it is irrelevant as a matter of
21 law to the charges in the indictment. United States v. Anderson,
22 872 F.2d at 1516 n. 12 (refusal to admit proffered evidence
23 relating to the defendant's CIA defense" as irrelevant and
24

25 ^{24/}(...continued)
26 F.2d at 975, a "good faith reliance" on government authority
27 defense would grant any criminal carte blanche to violate the law
28 should he subjectively decide that he serves the government's
interests thereby. Furthermore, even minor government officials
would have the ability to "immunize" individual's from
prosecution.

1 inadmissable, upheld). The exclusion of evidence such as
2 defendant's proffered "CIA defense" is consistent with the Supreme
3 Court's decision in United States v. Bailey, 444 U.S. 394, 416
4 (1979). In Bailey, the Supreme Court noted that a jury should not
5 be burdened with testimony regarding a defense where that defense
6 has already been determined to be legally insufficient. Id. at
7 416-17.^{25/}

8 Therefore, this Court should consider limiting or excluding
9 evidence based on defendant's "CIA defense" if it determines that
10 the defense, even if believed, is invalid because it could not
11 constitute a legally cognizable defense to the charges in the
12 indictment.

13 III

14 WITNESSES

15 A list of tentative witnesses will be supplied at the
16 beginning of trial, if defendant agrees to provide one at the same
17 time.

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19 //

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21 _____
22 ^{25/} For Example, the trial court in United States v. Wilson,
23 in refusing to admit the proffered evidence relating to the
24 defendant's "CIA defense" stated: "Whatever the defendant's
25 purpose, the introduction of evidence detailing classified
26 activities will have the tendency to focus attention on what
27 cannot be doubted is the controversial character of foreign
28 intelligence and counter intelligence operations Appeals
to the attitudes of the jurors by evidence of the alleged unseemly
character of American covert activities would divert their
attention from the basic issues in this case Wilson is
the defendant on trial, not the CIA. On appeal, the Second
Circuit affirmed the trial court's decision, concluding that the
trial court did not err in restricting defense presentation of
evidence. See United States v. Wilson, 750 F.2d 7, 9 (1984).

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IV

EXHIBITS

Defense counsel has already examined, or been provided the opportunity to examine all of the tapes (or transcripts), documents and physical evidence that the Government presently has in its possession that will be used in our case-in-chief. An exhibit list will be provided at time of trial, if defense counsel agrees to do the same.

V

DISCOVERY

The Government has supplied voluminous discovery far in excess of what is required under federal law. To date, no reciprocal discovery of any type has been provided by the defendant.

VI

JURY INSTRUCTIONS

The Government will provide a tentative list of jury instructions prior to trial. However, the Government requests that it be allowed to supplement these instructions depending on the evidence introduced at trial.