IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **MICHELLE REULET (3),** **TERRIE ADAMS (6), and** **CRAIG BROOMBAUGH (10),** **Defendants.**	**Case No. 14-40005-DDC**

MEMORANDUM AND ORDER

This case comes before the court on the following motions: (A) Craig Broombaugh's Response to Government's Notice of 404(b) Evidence (Doc. 526), which the Court construes as a motion *in limine*; (B) the Government's Motion in Limine to Exclude Portions of Defense Experts' Opinions (Doc. 535); (C) the Government's Motions in Limine and Memorandum in Support (Doc. 536); (D) Mr. Broombaugh's Motion for Adverse Inference Instruction (Doc. 538); (E) Mr. Broombaugh's Consolidated Miscellaneous Motions in Limine (Doc. 539) and Michelle Reulet's Motion in Limine (Doc. 540); (F) Mr. Broombaugh's Motion to Exclude Irrelevant Statements (Doc. 570); and (G) the Government's Motion for Lafler/Frye Inquiry and Memorandum in Support (Doc. 543).

A pretrial and *in limine* conference is scheduled for January 15, 2016 at 2:00 p.m. The Court does not plan to hear oral argument on the motions *in limine* because this Order rules on those issues. As for the government's *Lafler*/*Frye* request, the Court will conduct a *Lafler*/*Frye* Inquiry of Ms. Reulet, Ms. Adams, and Mr. Broombaugh on January 19, 2016 at 8:30 a.m.

I. Legal Standard

Motions *in limine* are creatures of neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence. *First Sav. Bank, F.S.B. v. U.S. Bancorp*, 117 F. Supp. 2d 1078, 1081 (D. Kan. 2000). They "give[] a court the chance 'to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.'" *United States v. Cline*, 188 F. Supp. 2d 1287, 1291 (D. Kan. 2002) (quoting *Palmieri v. Defaria*, 88 F.3d 136, 141 (2nd Cir. 1996) (further quotation omitted)). "Though such rulings can work a savings in time, cost, effort and preparation, a court is almost always better situated during the actual trial to assess the value and utility of evidence." *Id.* Thus, the "better practice is to wait until trial to rule on objections when admissibility substantially depends upon what facts may be developed there." *Id.* (citing *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir.), *cert. denied*, 423 U.S. 987(1975); *Hunter v. Blair*, 120 F.R.D. 667 (S.D.Ohio 1987)).

It is the movant's burden to demonstrate that the challenged evidence is inadmissible. *First Sav. Bank, F.S.B.*, 117 F. Supp. 2d at 1082. "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial." *Id.* (quotation omitted). And "the *in limine* exclusion of evidence should be reserved for those instances when the evidence plainly is inadmissible on all potential grounds." *United States v. Tunkara*, 385 F. Supp. 2d 1119, 1121 (D. Kan. 2005) (internal quotation and citation omitted).

A district court also has discretion to alter its previous *limine* ruling at trial. *Luce v. United States*, 469 U.S. 38, 41–42 (1984). It "may change its ruling at any time for whatever reason it deems appropriate." *United States v. Martinez*, 76 F.3d 1145, 1152 (10th Cir. 1996) (internal quotation and citation omitted). Consequently, a *limine* ruling "does not remove the

obligation of the party to object, move to strike, or to make offers of proof" at trial. *Deghand v. Wal-Mart Stores, Inc.*, 980 F. Supp. 1176, 1180 (D. Kan. 1997) (citing *Thweatt v. Ontko*, 814 F.2d 1466, 1470 (10th Cir. 1987).

II. Analysis

The Court rules each of the parties' motions, in turn, below.

A. Craig Broombaugh's Response to Government's Notice of 404(b) Evidence (Doc. 526)

Mr. Broombaugh's motion to exclude the evidence about his smoking and skimming money included in the government's Rule 404(b) Notice (Doc. 522) is denied. "The admissibility of Rule 404(b) evidence will generally be a fact-bound determination, depending to a significant degree on the character of the other evidence admitted at trial, all of which requires a balancing of probative value versus unfair prejudice at trial." *United States v. Lawless*, 153 F.3d 729, 1998 WL 438662, at *4 (10th Cir. July 15, 1998) (unpublished table opinion), *cert. denied*, 525 U.S. 1027 (1998).

1. Smoking Evidence

The relevance of evidence that Mr. Broombaugh smoked marijuana and preferred marijuana to smokable synthetic cannabinoids will depend on what proof the government adduces at trial. The Court thus declines to rule such evidence inadmissible at this time.

2. Skimming Evidence

The Court holds that the government cannot use or allude to evidence of Mr. Broombaugh skimming money in its case-in-chief or opening statement, but agrees with the government that such evidence could become relevant during other portions of the trial. The Court thus declines to exclude all evidence about skimming money now, and will decide as the case develops whether such evidence is admissible. If the government contends that

developments during trial have made such evidence relevant, the government must first raise this issue outside the presence of the jury.

B. The Government's Motion in Limine to Exclude Portions of Defense Experts' Opinions (Doc. 535)

The government asks the Court to exclude six categories of evidence from the opinions of defense expert witnesses, Dr. Woster and Dr. Buffington, under Federal Rules of Evidence 401 and 403. The Court addresses each of the government's requests below.

1. Dr. Woster's opinions about pharmacological effects, as beyond his qualifications; or in the alternative, Dr. Buffington's opinions, as being needlessly cumulative

Dr. Woster may be qualified to testify about both chemical structure and pharmacological effects. The Court thus denies the government's motion to exclude Dr. Woster's testimony about pharmacological effects. The Court also denies the government's motion to exclude Dr. Buffington's testimony as cumulative. Dr. Buffington may provide expertise in aspects of pharmacology that Dr. Woster cannot. And, if at trial the government believes that evidence presented is cumulative, it may reassert its objection.

2. Any opinions that the drugs in question (a) do not have substantially similar chemical structures or pharmacological effects, or (b) are not analogue drugs, because the experts have both indicated in their reports that there is insufficient information available to form such opinions

a. Substantially similar structures or effects testimony

The Court denies the government's motion to exclude, pretrial, all defense expert opinions that there is no substantial similarity between the drugs in issue and controlled substances. The Court provides the following guidance to the parties: A defense expert who has examined the government's expert testimony may conclude that insufficient information existed for that government expert to draw a conclusion about substantial similarity. That same defense

expert could testify that based on his own studies or research, the substances are not substantially similar. But, if the expert testifies that insufficient information exists for anyone to form an opinion on substantial similarity, then, naturally, the expert could not offer an opinion about a lack of substantial similarity. The Court will not determine such nuances *in limine*, and advises counsel that arguments about inconsistent testimony might be addressed more appropriately during cross-examination.

In response to the government's motion, Mr. Broombaugh argues that no expert should be allowed to testify "to the ultimate legal question" whether two compounds are substantially similar in chemical structure or pharmacological effect. To support his argument, Mr. Broombaugh cites *United States v. Makkar*, No. 14–5147, 14–5148, 2015 WL 7422599 (10th Cir. Nov. 23, 2015). However, the Court already has ruled that "substantially similar" testimony is not impermissible legal conclusion testimony. Doc. 546 at 19–20. The Tenth Circuit's opinion in *Makkar* does not change the Court's ruling. The Court reminds Mr. Broombaugh that it will instruct the jurors that the experts' opinions are not binding and they must draw their own conclusions.

b. Analogue drug testimony

The government also seeks to exclude defense expert opinions that the drugs in question are not analogue drugs. The Court holds that no witness—whether for the government or defense—may testify that a drug in question is or is not an analogue drug. The Court finds that this testimony would impermissibly usurp the role of the jury in applying the law to the facts. *See United States v. Garcia*, 635 F.3d 472, 476–77 (10th Cir. 2011); *United States v. Bates*, No. 1:11-cr-00123-BLW, 2012 WL 1579590, at *1 (D. Idaho May 4, 2012); *United States v. Rich*, 145 F. App'x 486, 488 (5th Cir. 2005).

3. Any opinion untethered to the actual opinions offered by the government's experts, and the actual bases for them, as opinions not based on facts

The Court agrees with Mr. Broombaugh that this motion should not be decided *in limine* and consequently denies the motion. At this stage, the Court does not know the exact opinions the experts will offer at trial, and thus it cannot determine whether Dr. Woster is misstating Dr. Willenbring's opinions before he refutes them. But the Court directs defendants and Dr. Woster that any testimony rebutting the government's expert at trial should be based on Dr. Willenbring's actual testimony. The government may renew this objection at trial if defendants' expert attempts to restate the government expert's opinions inaccurately.

4. Both experts' opinions about the law, as an improper intrusion into the Court's authority to instruct the jury regarding the law

a. Dr. Woster

The government moves for the exclusion of four opinions by Dr. Woster, asserting that they are inadmissible opinions about the law. Specifically, the government seeks to exclude: (1) Dr. Woster's opinion that there are inadequacies within the statutory definition of analogue drug; (2) his opinion that the Analogue Act is being improperly enforced; (3) his opinion that the statute's use of "substantially similar" is inappropriate because it is not a valid scientific term; and (4) his opinion that the scheduling of buphedrone was improper.

The Court grants the government's motion for the first and second opinions because they are irrelevant to this action. Dr. Woster is not permitted to testify about his opinions of purported inadequacies in the statutory definition of analogue drug or the enforcement of the Analogue Act. For the third opinion, Dr. Woster may testify that "substantially similar" is not scientifically defined and can be interpreted differently by chemists. But Dr. Woster is not permitted to testify that he thinks the statute's use of "substantially similar" is inappropriate or

too vague, or that he believes there should be a more scientific way to determine whether a drug is an analogue. Finally, the Court denies the government's motion to exclude Dr. Woster's opinions about buphedrone.

It is the Court's job to determine what substances were scheduled at a relevant time. But the Court is not convinced that buphedrone, itself, is a scheduled drug. The Court understands that mephedrone and any substance that contains any of its isomers is scheduled. 21 C.F.R. § 1308.11(d)(36). However, the Court finds no law declaring that buphedrone is an isomer of mephedrone. If the government's theory is that buphedrone is scheduled because it is an isomer of the scheduled drug mephedrone, a factual controversy appears to exist. The Court thus will allow qualified experts to opine whether buphedrone is an isomer of mephedrone.

b. Dr. Buffington

The government argues that Dr. Buffington, and also Dr. Woster to the extent he testifies about pharmacological effects, should not be allowed to testify that human clinical studies are required before a drug can meet the controlled substance analogue definition. The Court grants the government's motion in part. The defense experts cannot express opinions about what the government "should" or "must" do before concluding an alleged analogue is substantially similar in pharmacological effect or chemical structure to a controlled substance. Thus, the defense experts must not testify that human trials are required before a drug can meet the statutory definition. But, the experts may use the absence of human clinical studies to attack the proposition that a particular substance meets prong one or two under the statute. And, defendants may argue that the government's experts' opinions are unreliable without human clinical studies, if admissible evidence provides a basis for such an argument.

Similarly, the Court finds that any testimony about what studies the government should do before it schedules a drug is not proper for trial.

5. Any defense expert testimony about the FDA approval process for medicinal drugs offered for human consumption, as irrelevant, or as evidence that would tend to confuse the issues and mislead the jury

The Court grants the government's motion in part. Expert testimony about what the FDA approval process for prescription drugs is or should be is irrelevant to any issue in this case and thus is inadmissible. This includes any testimony that the government should be required to conduct human trials or test safety and efficacy before determining that a drug is an analogue. The Court can envision circumstances where parts of past FDA approval processes might become relevant, however. For example, past FDA approval processes might reveal evidence supporting an opinion that the government's expert testimony is unreliable. The Court finds testimony about the FDA's requirements to approve medicinal drugs irrelevant and inadmissible. But it is unwilling to rule that all FDA approval evidence is inadmissible at this time.

6. Dr. Buffington's opinion about the admissibility of evidence, as an improper intrusion into the Court's authority to rule on the admissibility of evidence

The Court previously conducted a *Daubert* hearing on the admissibility of Dr. Trecki's testimony and issued its Order (Doc. 546) concluding that he may testify at trial. The Court thus grants the government's motion to exclude Dr. Buffington's opinion about the admissibility of evidence. Dr. Buffington may rebut testimony offered by Dr. Trecki, but the Court will allow Dr. Trecki to testify and the jury choose to accredit or reject his testimony.

C. The Government's Motions in Limine and Memorandum in Support (Doc. 536)

The government moves to exclude: (1) arguments regarding defendants' ignorance of the law, mistake of law, or mistake of fact; (2) arguments regarding jury nullification; (3) evidence of "good acts"; and (4) defendants' exculpatory statements. The government also asks the Court to limit the number of character witnesses each defendant is allowed to call. The Court grants in part and denies in part the motion, as discussed below.

1. **Arguments regarding defendants' ignorance of the law, mistake of law, or mistake of fact**

The Court denies the government's motion to exclude arguments on ignorance of the law, mistake of law, or mistake of fact at this time. The Court reads *McFadden* and *Makkar*[1] to impose a burden on the government to prove that defendants *knew* they possessed one of two things: (A) a substance that both was substantially similar in chemical structure to a controlled substance *and* had, or was represented or intended to have, a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to a controlled substance; or (B) a substance that was controlled by the Controlled Substances Act (CSA) or Analogue Act. Thus, evidence and argument that goes to either one of these two things is fair game.

The government is free to prove the requisite knowledge using (A), (B), or both at trial. Accordingly, before trial, the Court will not exclude evidence relevant to either. If the government attempts to prove knowledge by showing defendants knew they possessed a substance substantially similar to a controlled substance, then argument and evidence that defendants did not know about or were mistaken about the similarities is relevant. The government's motion to exclude "mistake of fact" argument or a "good faith defense" is denied. And if the government strives to prove knowledge by showing defendants knew they possessed a substance controlled by the CSA or Analogue Act, evidence and argument that defendants did not know the substance was controlled by those laws would be relevant. The government's motion to exclude "ignorance of the law" or "mistake of law" arguments is denied.

[1] *McFadden v. United States*, 135 S. Ct. 2298 (2015); *United States v. Makkar*, No. 14–5147, 14–5148, 2015 WL 7422599 (10th Cir. Nov. 23, 2015).

2. **Arguments regarding jury nullification**

The Court grants the government's motion and prohibits defendants from presenting any irrelevant evidence intended to provoke the jury to disregard the law, or any evidence or argument urging jury nullification. The government contends that any evidence of the potential sentences defendants may receive is an indirect attempt at arguing jury nullification. The Court rules that the parties must not elicit testimony about the penalties faced by the three defendants, but, to the extent evidence about potential sentences faced by witnesses other than the three defendants in this trial is relevant to the witnesses' motivations or biases, such evidence is permissible. The Court intends to instruct the jury not to consider the potential sentences faced by witnesses when determining defendants' guilt or innocence.

3. **Evidence of "good acts"**

The Court agrees with Mr. Broombaugh that the government's motion to exclude evidence of "good acts" is premature. Certain kinds of good acts are admissible at trial. *See, e.g.*, *Makkar*, 2015 WL 7422599, at *5–6 (finding evidence that defendants asked law enforcement to test the substances to assure their legality and evidence that defendants offered to stop selling the incense until the results came in relevant and admissible). Out of the context of trial, the Court cannot determine what good acts evidence will be admissible. The Court thus denies the government's motion.

4. **Defendants' exculpatory statements**

The Court also denies the government's motion to exclude defendants' exculpatory statements as premature. The hearsay rules will apply to all parties at trial. Without knowing what the exculpatory statements are, or the context in which they will be raised, the Court denies the government's motion to exclude them.

The Court will address the government's objections to both good acts evidence and exculpatory statements when and if they arise at trial, and, of course, directs the parties to abide by the Rules of Evidence while questioning all trial witnesses.

5. **Number of character witnesses**

The Court denies the government's request to limit the number of character witnesses. The Court asks defense counsel to exercise their professional judgment when planning character witnesses for trial. And if character evidence becomes cumulative during trial, the Court will limit it. But the Court will not set a numerical limit on character witnesses pretrial.

D. Mr. Broombaugh's Motion for Adverse Inference Instruction (Doc. 538)

Mr. Broombaugh moves for an adverse inference instruction because, he argues, the government's refusal "to create [witness interview reports] is the functional equivalent to destroying the document." Doc. 538 at 4. He contends defendants are entitled to an inference that production of interview reports would have been unfavorable to the government because the government's refusal to create the reports equates to bad faith spoliation of evidence. Mr. Broombaugh thus asks the Court for three things: (1) to order the government to produce a list of witness interviews that have not resulted in a report that has been disclosed to the defense; (2) to order the government to produce any written materials, whether authored by an agent or prosecutor, related to those witness interviews to the Court for an *in camera* inspection; and (3) if the government fails to turn over any written material related to a witness interview, that the Court give an adverse inference instruction to the jury regarding that failure. The Court does not find the refusal to create witness statements equivalent to bad faith spoliation, and, for the reasons explained below, denies Mr. Broombaugh's three requests.

First, the Court will not order the government to provide defendants a list of witness interviews conducted without reports. During cross-examination at trial, defendants may ask a witness about any meetings at which government agents were present. And, after the witness has testified, defendants may move under the Jencks Act for the production of any agent report or other material containing a related witness statement. *See* 18 U.S.C. §3500. If no report is produced and circumstances of a meeting indicate a report was required by agency policy, defendants may raise this issue again and the Court will determine how to address it at that time.

Second, the Court denies Mr. Broombaugh's request for an Order compelling production and an *in camera* of government materials. This request is premature. The Court is not obligated to review questionable Jencks Act material *in camera* until after a witness testifies at trial. If it reviewed material now, the Court would have no ability to determine if the material relates to the witness's testimony, as required by the Jencks Act, because there has not yet been any testimony. And defendants are not entitled to discovery of government reports or witness statements except as provided by the federal rules and the Jencks Act—which currently do not entitle defendants to the materials requested. *See* 18 U.S.C. §3500; Fed. R. Crim. P 16(a)(2).

The Court also denies Mr. Broombaugh's third request—an adverse inference instruction—as premature. Under 18 U.S.C. §3500, only after a witness testifies must the government disclose witness statements to defendants. Defendants are not entitled to review any notes or reports at this time, and the Court is powerless to compel disclosure earlier than required by the Jencks Act and federal rules. Defendants thus have adduced no proof that the government is withholding or purposefully not creating information defendants are entitled to receive.

After filing this motion and his reply, Mr. Broombaugh filed a Notice of Intent (Doc. 566), informing the Court and other parties of his intent to seek continuances at trial. The

government told defense counsel it would provide Jencks Act material "the Friday before the week that the witness will testify." Doc. 566 at 1. Defense counsel does not believe this will give sufficient time to review the materials, and, consequently, may seek continuances in the middle of trial. While delays in trial are not ideal for any party, the government is not required to disclose Jencks Act materials before a witness testifies. The Court thus will grant defendants' requests for continuances where warranted.

In summary, the Court denies the motion for an adverse inference. Mr. Broombaugh's request is unusual because there has been no actual destruction of evidence. But, if there was a purposeful failure to create required reports, the Court will determine how to address this issue when it arises at trial. The Court directs the parties to abide by their pretrial disclosure obligations under *Brady*, *Giglio*, and the federal rules, and instructs the government to preserve any prosecution and agency notes or reports formed during any meetings with witnesses in anticipation of Jencks Act motions at trial. The Court concludes it is powerless to enforce a more fulsome or prompter disclosure and thus only can recommend that the government consider earlier disclosure of Jencks Act material.

E. Mr. Broombaugh's Consolidated Miscellaneous Motions in Limine (Doc. 539) and Michelle Reulet's Motion in Limine (Doc. 540)

Mr. Broombaugh and Ms. Reulet move the Court to exclude a variety of evidence, which the Court groups into 13 topics and addresses below.

1. Mr. Broombaugh asks the Court to preclude the government from asking the jurors to put themselves in the shoes of the theoretical victims.

The parties do not dispute that it is inappropriate to ask the jurors to place themselves in the shoes of victims. The Court thus grants Mr. Broombaugh's motion as a precautionary measure, and prohibits any such argument.

2. Mr. Broombaugh asks the Court to preclude the government from making legal argument during the government's opening statement.

The parties do not dispute that it is improper to make legal arguments during opening statements, but still seek an explicit pretrial ruling prohibiting it. The government states that it plans to reference various "definitions in the law" during its opening, but will not make legal argument. The rules for this trial are the same as in every case—the Court prohibits all parties from arguing the law during opening statements. However, references to legal terms, as long as they do not expand into legal argument, are permissible. The Court thus grants Mr. Broombaugh's motion, and its ruling applies it to all parties.

3. Mr. Broombaugh asks the Court to prohibit the Indictment from being read in its entirety to the jury or from being sent back to the jury room during deliberations, or alternatively to strike or redact any surplusage from the Indictment.

The Court finds the Indictment here is particularly argumentative, and agrees with Mr. Broombaugh that the jury should not have it in the jury room. The Court thus grants Mr. Broombaugh's motion and will not send the Indictment into the jury room. And, the Court also will not read the Indictment in its entirety to the jury. The Court directs the parties to remove cross-references to the Indictment when preparing their proposed jury instructions for the Court.

4. Mr. Broombaugh asks the Court to preclude the government from introducing evidence or mentioning the use of alien labor.

Mr. Broombaugh argues for the exclusion of any evidence of "alien labor." The government seeks to introduce an email from Ms. Reulet referring to "senoritas" and the related evidence that Hispanic women packaged defendants' products. The government also asserts that Mr. Broombaugh worked alongside some of the Hispanic women. But, the government agrees that the immigration status of the women is not relevant and should not be discussed. It contends, and the Court agrees, that evidence defendants used Latinas to package the products can be introduced without mentioning "alien labor." Therefore, the government may introduce evidence that women of Hispanic descent packaged the products at issue in this case to the extent relevant and otherwise admissible under the rules. But the Court prohibits the government from discussing their immigration status. The Court thus grants in part and denies in part Mr. Broombaugh's motion.

5. Mr. Broombaugh asks the Court to grant defendants additional peremptory challenges.

The Court grants Mr. Broombaugh's motion, but declines to award defendants the requested 25 peremptory challenges. Instead, the Court grants defendants 13 peremptory challenges—10 to exercise jointly and one additional challenge for each defendant, which defendants may exercise jointly or individually. The government will have six peremptory challenges, as mandated by Rule 24 of the Federal Rules of Criminal Procedure.

6. Mr. Broombaugh and Ms. Reulet ask the Court to preclude the government from introducing evidence or cross-examining any expert witness on the result of any previous trial in which the expert has testified, and from representing that the government generally wins or has generally won the synthetic drug cases it has filed.

The parties agree that testimony about the result of any previous trials is irrelevant. The Court thus grants Mr. Broombaugh and Ms. Reulet's motions and prohibits any such evidence at trial by the government or its witnesses.

7. Mr. Broombaugh asks the Court to introduce two statements as admissions against a party-opponent.

The Court denies Mr. Broombaugh's motion for the Court to introduce the statements as admissions against a party-opponent. Under Rule 801(d)(2)(A), a statement that is offered against an opposing party and was made by the party in an individual or representative capacity is not hearsay. But, such evidence must still be relevant to be admissible. At this time, the Court cannot determine if the two statements referred to by Mr. Broombaugh's motion are relevant to the case against the remaining three defendants. The Court thus declines to rule the statements admissible before trial, and will instead determine their relevance and admissibility under Rule 801 in the context of trial.

8. Mr. Broombaugh asks the Court to supplement its standard opening instruction about individualized-guilt determinations in multi-defendant cases.

The Court has considered Mr. Broombaugh's proposed addition to its opening instructions and believes its standard opening instruction is sufficient. Further instruction at the end of trial, if necessary, about individualized determinations of guilt can be addressed through the parties' proposed instructions and resolved at a later date. The motion is denied.

9. Ms. Reulet asks the Court to prohibit the government and its witnesses from introducing evidence of guilty pleas entered by defendants in this case, unless the defendant is testifying at trial.

The Court will not prohibit all evidence of non-testifying defendants' guilty pleas at this time because the relevance and admissibility of such evidence cannot yet be determined. But, the Court agrees with Ms. Reulet that, before the government may elicit evidence about a non-testifying defendant's plea in front of the jury, the government must approach the bench and allow the Court to rule on its admissibility. The Court thus grants in part and denies in part Ms. Reulet's motion, and orders the government to approach the bench before introducing evidence of non-testifying defendants' pleas.

10. Mr. Broombaugh and Ms. Reulet ask the Court to exclude evidence of ill effects, potential harms, or danger from the substances at issue.

Specifically, Mr. Broombaugh asks the Court to preclude the government from calling any drugs "dangerous" or otherwise eliciting evidence of the potential harms related to the substances at issue. And Mr. Broombaugh wants the government precluded from introducing evidence or commenting on the alleged harmful effects of ingestion of the products. Ms. Reulet asks the Court to prohibit representations about the ill effects on consumers of the products manufactured or sold by defendants. And, she wants the government precluded from introducing instances of overdoses or other ill effects to consumers of products *not* manufactured or sold by defendants.

All three defendants are charged with conspiracy to distribute controlled substances and controlled substance analogues and conspiracy to commit mail fraud. Outside the incremental context that a trial provides, the Court is not willing to determine the relevance to Count 1 or Count 2 of any danger, harms, or ill effects evidence. The Court instead will determine the relevance and admissibility of such evidence in the context raised at trial. But, the Court holds

that the government cannot call the drugs "dangerous" or refer to their potential harms in its opening statement. Statements about the drugs endangering people, without first adducing evidence that any dangerous propensities are relevant to a fact in issue in this case, would inflame the jury. The Court cautions the government that evidence about a drug's effects must come from witnesses or admissible exhibits. And the government must adduce relevant proof of the drug's harmful, dangerous, or ill effects, before referencing "dangers," "harms," and the like in front of the jury. Counsel should approach the Court out of the presence of the jury to inquire whether this burden has been met before using any such bombastic language at trial.

The Court thus denies Mr. Broombaugh and Ms. Reulet's motions to exclude all evidence of the drugs' dangers, harmful effects of ingestion, or ill effects on consumers at this time. The Court grants in part Mr. Broombaugh's motion and prohibits the government from using "dangerous" language during its opening statement and before the government has satisfied the Court it has met its burden for admitting any such evidence. Evidence of overdoses and ill effects from products *not* manufactured or sold by defendants' strikes the Court as irrelevant and unfairly prejudicial, and thus the Court grants Ms. Reulet's motion to exclude such evidence.

11. Mr. Broombaugh asks the Court to preclude the government from introducing evidence or commenting on the lack of quality controls or safety in the manufacturing process.

The Court declines to determine the relevance and admissibility of quality control and safety evidence outside of the context of trial. The Court thus denies Mr. Broombaugh's motion to exclude such evidence, and will instead determine its admissibility during trial.

12. Mr. Broombaugh and Ms. Reulet ask the Court to prohibit evidence that any substances were marketed to minors.

The Court denies Mr. Broombaugh and Ms. Reulet's motion to prohibit evidence of marketing to minors. Federal Rule of Evidence 701 permits a lay witness to offer an opinion that

is rationally based on the witness's perception. If a witness meets this standard and the opinion is relevant, the witness may be permitted to offer that lay opinion. The government has not yet shown that a lay opinion of this nature is relevant, *i.e.*, it "is of consequence in determining the action." Fed. R. Civ. P. 401(b). And the government must do so before asking a witness to offer such an opinion. But, given the relatively forgiving nature of the definition of relevant evidence and the Rule 402 standard of admitting relevant evidence unless precluded by the Constitution, a statute, or the rules of evidence, the Court is unwilling to exclude as irrelevant all evidence that defendants' consumers were minors before trial starts.

Mr. Broombaugh and Ms. Reulet argue that, even if relevant, the Court should exclude such evidence under Rule 403 as unfairly prejudicial. But, without knowing exactly what evidence defendants attempt to exclude with this motion or what the government hopes to present at trial, the Court also defers ruling whether prejudice substantially outweighs probative value. The Court provides the following guidance to the parties: The product's labels and how defendants marketed the products appear relevant to the mail fraud charges. And based on its current understanding, the Court does not find the content of the labeling defendants allegedly chose to use to be unfairly prejudicial under Rule 403. However, the government must meet a higher burden to overcome Rule 403 before the Court will admit evidence that defendants purposefully designed the labeling to attract minor customers, or that the FDA's concern about safety increases when drugs are marketed to minors. The government has not convinced the Court that such evidence is relevant, and, even if relevant, this evidence seems to have significant potential to impose unfair prejudice on defendants.

Finally, Ms. Reulet argues the government must satisfy a Rule 104 burden outside the presence of the jury before the Court should admit evidence that defendants marketed the

substance to minors. The Court disagrees, and finds that it can determine admissibility during trial, instead of trying the case twice—once in a Rule 104 / no jury setting and then again in front of the jury.

13. Mr. Broombaugh asks the Court to exclude evidence about the FDA and DEA roles in policing public safety.

The Court denies Mr. Broombaugh's motion to prohibit testimony that the FDA and DEA have a duty to keep things "safe." The Court is not willing to exclude all evidence on the FDA and DEA roles before trial. But, at the same time, the Court does not deem everything about this subject admissible pretrial either. The admissibility of such evidence will depend on the context in which it is raised at trial.

The government is permitted to give some background to the jury, for example information about why the Analogue Act is necessary. The Court likely will allow the government to provide some background about the role the Analogue Act plays, *i.e.*, that the market for analogue substances moves faster than legislation can designate substances as controlled substances. But, admissibility of even that information will depend on how the evidence is presented. The Court will not allow evidence meant to inflame the jury or lengthy discussions about the laws, regulations, and agencies.

Finally, in his arguments for topics 10, 11, and 13, Mr. Broombaugh asks the Court to sever his trial if the Court finds evidence on those topics relevant only to charges against Ms. Reulet. Above, the Court declines to rule the evidence irrelevant to the charges against Mr. Broombaugh and thus denies Mr. Broomabugh's request to sever his trial. He may request a limiting instruction if he wishes, but the Court does not find that he is entitled to a separate trial because all of the defendants are not charged on every count.

F. Mr. Broombaugh's Motion to Exclude Irrelevant Statements (Doc. 570)

Mr. Broombaugh's motion to exclude a co-conspirator statement is denied. The Court questions this motion's timeliness, but, nevertheless, rules on its merits. Mr. Broombaugh alleges an essential element of the offense was omitted from the Indictment—that defendants knew the substances they dealt with bore a substantially similar chemical structure to a controlled substance. He argues that, without any such allegation in the Indictment, all evidence of his knowledge of chemical structures is irrelevant. The Court disagrees.

"An indictment is sufficient if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense." *United States v. Washington*, 653 F.3d 1251, 1259 (10th Cir. 2011) (internal quotations and citations omitted). The essential element here is simply knowledge, which the government can establish in two ways. First, the government can prove knowledge by showing a defendant knew he possessed a substance that had both substantially similar chemical structure and pharmacological effect to a controlled substance. *United States v. Makkar*, Nos. 14-5147, 14-5148, 2015 WL 7422599, at *1 (10th Cir. 2015). Second, the government can prove knowledge by showing that a defendant knew he possessed a substance that was controlled by the CSA or Analogue Act. *Id.*

Here, the Indictment sufficiently alleges knowledge, stating that Mr. Broombaugh conspired to "knowingly and intentionally possess with intent to distribute . . . controlled substance analogues, as defined in 21 U.S.C. § 802(32) . . . in violation of [21 U.S.C. § 846] and [18 U.S.C. § 2] . . . ." Doc. 333 at 29–30. The Indictment sufficiently sets forth the elements of the offense charged, puts Mr. Broombaugh on fair notice of the charges against which he must defend, and enables Mr. Broombaugh to assert a double jeopardy defense. The Court thus denies

Mr. Broombaugh's motion to exclude evidence that he knew about the chemical structures of the substances.

G. The Government's Motion for *Lafler/Frye* Inquiry and Memorandum in Support (Doc. 543)

The Court grants the government's motion and will conduct a *Lafler/Frye* inquiry of Ms. Reulet, Ms. Adams, and Mr. Broombaugh on Tuesday January, 19, 2016, before the start of trial. The Court directs the parties to appear at 8:30 a.m. All parties shall attend this inquiry, including the government.

III. Conclusion

The Court directs counsel for all parties to inform their witnesses of the above rulings and direct them to comply with the rulings. The Court will provide a summary of rulings for this use.

The Court rules as follows, subject to the Court's comments above.

IT IS THEREFORE ORDERED BY THE COURT THAT Mr. Broombaugh's Response to Government's Notice of 404(b) Evidence (Doc. 526) is denied.

IT IS FURTHER ORDERED THAT Government's Motion in Limine to Exclude Portions of Defense Experts' Opinions (Doc. 535) is granted in part and denied in part.

IT IS FURTHER ORDERED THAT Government's Motions in Limine (Doc. 536) are granted in part and denied in part.

IT IS FURTHER ORDERED THAT Mr. Broombaugh's Motion for Adverse Inference Instruction (Doc. 538) is denied.

IT IS FURTHER ORDERED THAT Mr. Broombaugh's Consolidated Miscellaneous Motions in Limine (Doc. 539) and Michelle Reulet's Motion in Limine (Doc. 540) are granted in part and denied in part.

IT IS FURTHER ORDERED THAT Mr. Broombaugh's Motion to Exclude Irrelevant Statements (Doc. 570) is denied.

IT IS FURTHER ORDERED THAT Government's Motion for *Lafler/Frye* Inquiry and Memorandum in Support (Doc. 543) is granted.

IT IS SO ORDERED.

Dated this 11th day of January, 2016, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge