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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TEOFIL BRANK,
aka "Jarec Wentworth,"
aka "@JarecWentworth,"

Defendant.

CR No. 15-131(A)-JFW

GOVERNMENT'S OPPOSITION TO
DEFENDANT BRANK'S MOTION FOR
JUDGMENT OF ACQUITTAL PURSUANT TO
FED. R. CRIM. PRO. 29

Hearing Date: August 21, 2015
Hearing Time: 9:00 a.m.
Location: Courtroom of the
Hon. John F. Walter

Plaintiff United States of America, by and through its counsel
of record, the United States Attorney for the Central District of
California and Assistant United States Attorneys Kimberly D. Jaimez
and Eddie A. Jauregui, hereby files its opposition to Defendant
Brank's Motion for Judgment of Acquittal Pursuant to Fed. R. Crim.
Pro. 29. (Dkt. 296).

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1 First, with respect to element one of Count One, transmission of
2 a true threat, the government establishes a "true threat" under the
3 objective standard by showing that a reasonable person would
4 interpret the defendant's messages as communicating an intent to
5 injure reputation. In considering true threats objectively, it is
6 irrelevant whether reputational harm has already occurred or would be
7 objectively possible. A victim who has already put his reputation at
8 risk, does not exonerate a defendant specifically threatening to harm
9 that reputation with statements like "I can bring your house down,"
10 and "money won't wash away what people will read and see of you."
11 Defendant erroneously emphasizes the status of Victim's reputation in
12 claiming that it was already in peril or already sullied. As an
13 initial matter, this is not factually correct. But more importantly,
14 the objective analysis should only consider how a reasonable person
15 would interpret defendant's expressed intentions in context. Here,
16 the texts and context indicate intent to harm the Victim's
17 reputation. Thus, the evidence adduced at trial demonstrated a "true
18 threat."

19 Second, with respect to element one of Count Two, extortion, the
20 government need only prove that defendant exploited Victim's
21 "reasonable" fear. The Victim's fear was reasonable in this context
22 because the Victim had managed to segregate his secret, illegal
23 activity from his business life and his peers. When defendant
24 threatened widespread exposure on social media, defendant reasonably
25 feared the repercussions to his business relationships, his banking
26 relationships, and other relationship, which had been siphoned off
27 from his illegal prostitution activity.

1 Third, with respect to element one of Count Five, attempted
2 extortion, the government need only prove defendant's intent to
3 exploit the Victim's fear. Attempted extortion does not require any
4 evidence regarding the Victim's state of mind or the reasonableness
5 of a victim's fear. All that is required that evidence reflect
6 defendant's intention to capitalize on the fear. As such, arguments
7 about Victim's vulnerability to exposure are completely irrelevant to
8 attempting extortion. Here, the text messages and witness testimony
9 of the Victim, and defendant's own associate Etienne Yim, confirmed
10 that defendant wanted to exploit the Victim's fear.

11 Thus, the Court should deny defendant's motion as the evidence
12 adduced at trial on all counts was sufficient to support the
13 convictions.

14 **II. STATEMENT OF FACTS**

15 **A. Procedural History**

16 On March 20, 2015, a grand jury returned a single-indictment
17 against defendant charging him with transmitting threatening
18 communications with intent to extort, in violation of 18 U.S.C.
19 § 875(d). (Dkt. 10.) On May 1, 2015, the grand jury returned a
20 First Superseding Indictment ("FSI") adding additional counts,
21 including counts of extortion and attempted extortion in violation of
22 the Hobbs Act, codified at 18 U.S.C. § 1951(a). (Dkt. 93.) On June
23 19, 2015, defendant filed the pretrial motion to dismiss the FSI
24 counts charging defendant with extortion and attempted extortion
25 under the Hobbs Act. (Dkt. 195.) Like the instant Rule 29 Motion
26 challenging the Victim's reputational harm, the pretrial motion
27 challenged the Victim's reputational harm on the theory that
28 defendant's threats to Victim's reputation could not violate the

1 Hobbs Act as a matter of law. (Id.) The Court denied that motion on
2 July 6, 2015. (Dkt. 257.)

3 The matter went to trial on July 7, 2015. The parties completed
4 jury selection, opening statements and the government commenced its
5 case-in-chief on July 7, 2015. The government continued its
6 presentation of evidence over the next day and rested on July 8,
7 2015. The defense rested its case the same day. On July 9, 2015,
8 defendant made his original Rule 29 motion for a judgment of
9 acquittal, which the Court summarily denied. (Dkt. 270.)
10 Thereafter, the parties gave their closing arguments, and the case
11 was submitted to the jury. (Id.) The jury returned a verdict of
12 guilty on Counts One through Six of the trial indictment. (Id.)

13 **B. The Trial Indictment**

14 The final Trial Indictment, pursuant to which defendant was
15 convicted, was in the following six counts:¹ (Dkt. 261.)

- 16 - Count One charged defendant with transmitting communications
17 threatening Victim's reputation in interstate commerce with
18 intent to extort, in violation of 18 U.S.C. § 875(d) and
19 related to defendant's communications with the Victim on or
20 around February 16, 2015 ("Count One");
21 - Count Two charged defendant with Hobbs Act extortion based on
22 defendant's acts on or about February 16 to 17, 2015, when
23 defendant demanded the Victim's Audi r8 and \$500,000
24 ("Count Two");
25 - Counts Three through Four charged defendant with receiving
26 proceeds of extortion, in violation of 18 U.S.C. § 880 and
27 related to defendant's receipt of the Audi r8 and \$500,000
28 wire transfer as a result of his February 16-17, 2015 conduct
("Counts Three & Four");

27 ¹ Count Seven, possession of a firearm in furtherance of a crime
28 of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i), was
dismissed by the Court prior to the jury trial (Dkt. 257.)

- Count Five charged defendant with attempted Hobbs Act extortion and related to defendant's March 3, 2015 demand that Victim pay \$1 million ("Count Five"); and
- Count Six charged defendant with use of an interstate facility to facilitate an unlawful activity, in violation of 18 U.S.C. § 1952(a)(3) and related to defendant's March 3, 2015 use of a cellphone in connection with his attempted extortion on March 3, 2015 ("Count Six").

On July 27, 2015, defendant renewed his motion for acquittal by filing another Rule 29 motion (Dkt. 296) moving to dismiss Count One, Count Two, and Count Five. (Mot., 2.)

C. EVIDENCE AT TRIAL

During the trial the jury heard the Victim testify at length about his reputation, his secret pay-for-sex activity that began in 2013, and defendant's threats to expose such activity on social media, unless defendant's demands were met. (RT, 296-2, 79:23 to 296-3, 38:13).² With respect to his reputation, the Victim testified that he is the founder and president of the Donald A. Burns Foundation as well as the chairman of the board of magicJack VocalTec, Limited, a small public company. (RT, 296-2, 78:21-24.) Before working with magicJack, the Victim founded and sold another telecommunications company. (RT, 296-2, 79:1-2.) The Victim also testified that he lives in "small towns" in Palm Beach, FL and Nantucket, MA. (RT, 296-2, 78:14-15.)

The Victim testified that, during the first 48 to 50 years of his life he "maintained an impeccable reputation in the communities that [he] worked in, with the people [he] did business with, and with [his] friends and family." (RT, 296-3, 36:13-19.)

² "RT" refers to the reporter's transcripts of the trial, which was filed by defendant at Docket No. 296 in five parts. Citations include the relevant docket entry followed by the page number.

1 1. Victim's Pay-For-Sex Meetings

2 The Victim admitted during trial that beginning in March or
3 April 2013, the Victim began paying pornography actors to have sex
4 with him. (RT, 296-2, 118:6.) The Victim explained that every three
5 to six weeks, he would have gatherings of one to four pornography
6 actors who would come to one of his homes or a hotel, stay the night,
7 have sex and leave the next morning in exchange for \$1,500 - \$2,000
8 (usually in cash). (RT, 296-2, 117:24 - 118:14.) The pornography
9 actors "would have the opportunity to refer a friend or associate in
10 the adult industry" in exchange for a referral fee in most instances.
11 (RT, 296-3, 118:16-23.) However, this recruiting did not occur on a
12 "regular basis." (RT, 296-3, 119:11-13.) Only other pornography
13 actors would come to these meetings - not the Victim's business
14 associates or personal friends. (RT, 296-2, 13:25-14:2.)

15 The Victim also testified that he intended to keep his pay-for-
16 sex meetings a secret because: "I would have been embarrassed for my
17 friends to know that I was having these paid sexual encounters." (RT,
18 296-3, 69:15-16.) Indeed, the Victim expected discretion from the
19 pornography actors with whom he had dealings because "each person
20 that was coming to a meeting had an interest very similar to [the
21 Victim] that keeping this [sic] activities private was in their best
22 interest as much as it was to [Victim's] best interests". (RT, 296-
23 3, 67:5-10.) The Victim also testified that he always tried to treat
24 the pornography actors with respect and stayed on good terms with
25 these individuals. (RT, 296-2, 14:5-9.)

26 Besides expecting discretion from these actors/prostitutes, the
27 Victim testified that he also used a separate email address,
28 "argomediallc@gmail.com," for all communications that involved

1 prostitution. (RT, 296-2, 123:12-124:4.) The Victim testified:
2 this was a "discrete email address . . . so this - these kind of
3 communications were segregated from my work and personal email
4 account." (RT, 296-2, 123:23-25.)

5 The Victim emphasized that he consistently kept this secret from
6 his business associates and his circle of friends. (RT, 296-3,
7 66:25-67:4, 69:18-19.) The Victim was not, however, secret or
8 ashamed of being seen with young, attractive men. To the contrary,
9 the Victim explained that he lived in Palm Beach, Florida and "to see
10 people out publically either married or dating that have a 25-year
11 age difference is something that happens every day of the week, and
12 no one bats an eye at it. . ." (RT, 296-3, 69:24-70:2.) The Victim
13 noted in his testimony that prostitution was different and stated: "I
14 would have been embarrassed for my friends to know that I was having
15 these paid for sex encounters." (RT, 296-3, 69:25-16.) He further
16 testified: "None of my friends knew" that he paid for sex. (RT, 296-
17 3, 67:4.)

18 2. Mackinzie Amadaon

19 The Victim also testified about his special relationship with
20 Mackinzie Amadaon, who he described as both a friend and a companion.
21 (RT, 296-2, 14:25). The Victim explained that although he originally
22 met Mr. Amadon through a pay-for-sex meeting in late 2013, the
23 relationship evolved. (RT, 296-2, 16:6-15.) The Victim traveled
24 with Mr. Amadon and began financially supporting Mr. Amadon in
25 October 2013, providing Mr. Amadon with approximately \$4,000 to
26 \$5,000 per month. (RT, 296-2, 159:12.) The Victim explained the he
27 introduced Mr. Amadon to many of his friends, including politicians,
28 but only a small group knew that Mr. Amadon had a former gay

1 pornography career, and no one knew the prostitution origins of the
2 relationship. (RT, 296-3, 66:11-24.)

3 3. Victim Meets Defendant

4 The Victim met defendant through a pay for sex encounter and
5 eventually began paying defendant for referring other pornography
6 actors to the Victim for sexual liaisons. (RT, 296-2, 79:7 - 80:13.)
7 The Victim paid defendant for sexual contact approximately four times
8 and paid for referrals approximately four times as well. (RT, 296-2,
9 122:5, 16). In each case, defendant usually received \$1,500 to
10 \$2,000 per incident, and Victim was not aware of ever owing defendant
11 money for unpaid services. (RT, 296-2, 123:5.)

12 The referral arrangement began to falter in early 2015, when
13 defendant refused to refund a referral fee to the Victim for a sexual
14 encounter that never came to be. (RT 296-2, 80:21-81:3.) One month
15 after this incident, on February 16, 2015, defendant began sending
16 threatening text messages which were catalogued in Exhibit 108.

17 Defendant's initial texts included the following:

- 18 • So another month has past and you broke your word again.
19 Tisk. Tisk. (Item 382)
- 20 • The car, How can we work if trust is broken.
21 (Items 380-379).

22 Victim responded to the above by texting the following: "I
23 think we don't have any working relationship anymore. The \$2,000
24 advance is an outstanding issue. You're right that I'm not
25 interested in making a big deal out of it, but I'm not comfortable
26 working together after that." (Ex. 108, Item 377.)

1 To this, defendant fired back, via text, warning that he could
2 "bring [Victim's] house down" by publishing embarrassing truths and
3 even lies about Victim on social media:

- 4 • Be wise on How you reply. I can bring your house down Don.
5 This was a simple conversation and you throw this Shit out
6 on me. Don't get me mad. I do have a twitter and your
7 photos. Lies can be made or Maybe it's the truth. Just
8 saying. Have a good day. (Items 376-373.)
- 9 • You promised me you would Let me drive the r8. Cars are my
10 life you know that. Show Im Nothing to you. Promises
11 broken. I'm feeling evil right now. Disappointed. (Items
12 358-355.)

13 (Ex. 108.)

14 Victim replied to the above by suggesting the two put their
15 differences behind them texting "if we annoy each other, then we
16 should call each other assholes and put it behind us! Not all this
17 bad energy!" (Ex. 108, Item 351.)

18 To this defendant hurled the following text messages
19 specifically related to Victim's reputation and what people would
20 read and see about the Victim:

- 21 • Check my twitter, the conversation will grown and questions
22 will be asked. You lied to me and treated me like Shit. I
23 asked again and you put it behind you. Now it's biting your
24 ass. I think by the time I'm out of the gym you will have
25 a Sweet treat for me that will make me erase my tweet.
26 Think hard. You know me right. (Items 347-349).
- 27 • I can't get a friendship anymore, because will who want to
28 be friends with black mail. . . . I guess finding you boys
is out of the picture So it leaves me with Nothing to want
out of this. So I'm just going to bite hard. You got money
but I Don't want that. Money won't wash away What people
will read and see of you. Wow I guess I hold the cards
right now. And trust me the other guys will stand with me.
(Items 344-345.)

(Ex. 108.)

1 Justin Griggs testified that soon after the above text messages
2 he received a call from the Victim asking him to check defendant's
3 Twitter account for any tweets regarding the Victim. (RT, 296-3,
4 79:10-13.) Mr. Griggs saw the post referenced in the above text and
5 sent the Victim a screenshot of the post, Exhibit 115. (Id.) The
6 Victim testified that when he saw the post, which said "Do any porn
7 stars know a guy named Don, yes Don," he became sick to the point
8 that his hands were shaking. (RT, 296-2, 96:5-20.) The Victim knew
9 defendant had a significant Twitter fan base as a well-known
10 pornography actor. (RT, 296-2, 98:9-10.) The Victim took this post
11 as defendant's proof that he "fully intended" to do something more
12 than this if the Victim failed to meet defendant's demand for a
13 "sweet treat." (RT, 296-2, 97:6-9.) Soon after, there was a retweet
14 on a well-known gay blog, Str8upgayporn.com, and defendant texted the
15 Victim about the retweet. (RT, 296-2, 101:9-15; Ex. 108, Item 338.)

16 In item 342-341 of the text messages in Exhibit 108, the Victim
17 asked defendant to clarify what defendant wanted and begged defendant
18 to take down posts regarding the Victim. To this, defendant
19 articulated what defendant would require before erasing any Twitter
20 posting:

- 21 • I want a new car, motorcycle and both hands full of cash.
22 Then I'll erase it and you. (Items 333-332.)
- 23 • The r8 and 250,000.00. Have the money in the care with the
24 title. Simple. Make your calls. (Items 327-325.)

25 In a phone call between the Victim and defendant after the text
26 messages on February 16, 2015, defendant doubled the demand to
27 \$500,000 because the Victim said he couldn't transfer the money the
28 same day. (RT, 296-2, 105:24-25.)

1 Later on February 16, 2015, defendant picked up the Victim's
2 Audi r8. (RT, 296-2, 110:22-23). On February 17, 2015, the Victim
3 sent defendant a wire transfer of \$500,000. (Exs. 105, 501.) At
4 trial, the Victim testified that he felt compelled to comply with
5 defendant's demands because posted information, whether the truth or
6 lies, could harm his reputation, the Victim had no "bargaining power"
7 — he had to act quickly to prevent spread of information on the
8 online. (RT, 296-2, 101:18-23, 102:7-14, 104:7-12, 111:4-8.)

9 Etienne Yim testified at trial that during this period in
10 February 2015, defendant admitted to him that he was obtaining the
11 money from the Victim through "blackmailing stuff." (RT, 296-4,
12 96:15.)

13 Victim testified at trial extensively that he feared that
14 defendant would post either embarrassing truths or outright lies on
15 social media that could spread exponentially. (RT, 296-2, 93:21-
16 94:1, 95:6-8.) Specifically, the Victim testified as follows:

17 The defendant had previously referred in the other text
18 message to either communicate in truth or lies. The truth
19 that he knew about me that was so embarrassing and shameful
20 was that I had been paying for sex. . . . I was afraid
21 that he would post that truthful information to his Twitter
22 account and that that information, with the way the
23 internet works today, would spread like wildfire
24 We live in a world today where social media outlets like
25 Twitter are so interconnected with the internet and other
26 social media outlets that, once a piece of information is
27 posted on social media, it literally spreads and is almost
28 impossible to recover. In other words, if something, either
a lie about me were published on social media or an
embarrassing truth, then, even if that was posted for a
matter of hours, people could, for example, retweet it.
They could blog about it. They could do any number of
things almost instantly, and you'd never really be able to
get that negative information, whether it was the truth or
lie, back.

1 (RT, 296-2, 85:24 - 87:4.) The Victim added that he was "scared to
2 the core of what [defendant was] going to write about [him] on
3 Twitter." (RT, 296-2, 105:7-8.)

4 Notwithstanding Victim's compliance with defendant's demands on
5 February 16-17, 2015, defendant made additional demands. (RT, 296-2,
6 112:19-200, Ex. 108, Items 204-201.) The Victim testified that upon
7 reading these other texts, he realized that defendant's demands for
8 money - in exchange for maintaining the Victim's privacy and keeping
9 the Victim's reputation intact - were never going to end. (RT, 296-
10 3, 18:15-17.)

11 On March 3, 2015, while the Victim happened to be meeting with
12 the FBI, the Victim received the following text message demands from
13 defendant:

- 14 • New deal, new deal
- 15 • Account will be deleted if new deal is reached.
- 16 • I want a condo here in LA. Bachelor pad. You have a taste I
17 like. 2 bed Max. Perfer one. I want 300,000.00 cash. You
18 can and will. I want this over ASAP like yesterday. So you
can be at peace.
- 19 • They go for more though
- 20 • 1 mill cash

21 (Ex. 101).

22 The Victim testified at trial that he interpreted these text
23 messages, to mean that defendant wanted "\$1 million cash in exchange
24 for, once again, not publishing either lies about me on his Twitter
25 feed or really embarrassing and shameful truths." (RT, 296-3, 32:16-
26 18.) The Victim explained to the jury that by that time, the Victim
27 "was fearful every minute that [defendant] would lose his temper,
28

1 that [defendant] would post information on his Twitter account." (RT,
2 296-3, 33:20-23.)

3 The following day, March 4, 2015, defendant was arrested when he
4 tried to recover the \$1 million. (Ex. 202.)

5 After the defendant's arrest, the Victim turned over his cell
6 phone to allow agents to conduct an independent extraction. (Ex.
7 108.) During his testimony, the Victim explained that he declined a
8 limitless search of his cellphone because it was filled with personal
9 information, pictures of friends and family and was "literally full
10 of attorney/client communications in matters not relating to this"
11 case. (RT, 296-2, 82:3-6.) FBI Special Agent ("SA") Bauman also
12 testified at the trial regarding the extraction of the Victim's and
13 defendant's phones and verified that the content in both appeared to
14 "prove the existence of the extortion." (RT, 296-5, 177:12-17.) SA
15 Bauman also testified that he and the other agents engaged in several
16 investigative steps to further confirm the extortion scheme including
17 issuing subpoenas, seeking court orders for phone records, obtaining
18 search warrants, conducting extractions of cell phones, etc. (RT,
19 296-5, 178:21 - 179:19.)

20 At the conclusion of his testimony, the Victim summarized why he
21 was fearful of defendant's threat to post:

22 When you have not only worked at but actually lived a life
23 that the community respected through deed and through
24 practice, the community is never going to look at you the
25 same way no matter what. Once this information is widely
26 distributed on the internet, people that you work with in
the future will see it, and everybody that lives in your
community will see it, and really nothing will ever be the
same. . . .

27 The challenging part about having one's reputation ruined
28 is you don't always know. You don't always know what new
business relationships you won't form because people know
about things that you've done that you're ashamed of. You

1 don't know in banking relationships, when you're
2 renegotiating a banking relationship, that the bank won't
3 offer you less desirable terms or not do business with you
4 again. When you're forming interpersonal relationships, if
5 you'd like to be in another long-term relationship or date
6 or get married, you don't know how people that read this
information will view you in that light. And even from a
charitable giving perspective, you don't know if some
charities, for example, may not even want your support in
the future. There's really no part of your life that what
he threatened to do to me doesn't touch.

7 (RT, 296-3, 36:22-37:18) (emphasis added).

8 **III. ARGUMENT**

9 **A. Standard for Rule 29 Motion for Judgment of Acquittal**

10 Defendant's Motion is pursuant to Rule 29 and seeks a judgment
11 of acquittal on Counts One, Two, and Five. (Mot., 7, 12.) The Court
12 reviews a defendant's motion for judgment of acquittal under Rule
13 29(c) with a standard that is extremely deferential to the
14 prosecution and one that creates an exceptionally lofty legal hurdle
15 for a defendant to surmount. "[E]vidence is sufficient to sustain a
16 conviction if, when it is construed in the light most favorable to
17 the prosecution, any rational trier of fact could have found the
18 essential elements of the crime beyond a reasonable doubt." United
19 States v. Duenas, 691 F.3d 1070, 1083 (9th Cir. 2012), citing United
20 States v. Nevils, 598 F.3d 1158, 1161 (9th Cir. 2010) (quotation
21 marks and citation omitted). The Ninth Circuit has held that it is a
22 "rare occasion" in which a properly instructed jury would convict
23 when it can be said that no rational trier of fact could find guilt
24 beyond a reasonable doubt. Nevils, 598 F.3d at 1167.

25 In adjudicating a Rule 29 motion, the district court may not
26 second-guess the jury's credibility assessment of witness and must
27 resolve all questions about witnesses' credibility in the
28 prosecution's favor. Id., at 1170; see United States v. Alarcon-

1 Simi, 300 F.3d 1172, 1176 (9th Cir. 2002) ("Notably, it is not the
2 district court's function to determine witness credibility when
3 ruling on a Rule 29 motion . . . it is the exclusive function of the
4 jury to determine the credibility of witnesses, resolve evidentiary
5 conflicts, and draw reasonable inferences from proven facts.")
6 (citations and quotations omitted). Even as to witnesses who are
7 "clearly revealed to be not the most lucid or even believable," the
8 district court's Rule 29 analysis cannot "invade[] the province of
9 the jury to sort through the conflicting testimony and resolve the
10 conflicts in accordance with the reasonable doubt standard." United
11 States v. Rojas, 554 F.2d 938, 943 (9th Cir. 1977) (quotations
12 omitted). "This means that a [reviewing court] may not usurp the
13 role of the finder of fact by considering how it would have resolved
14 the conflicts, made the inferences, or considered the evidence at
15 trial." Nevils, 598 F.3d at 1164 (9th Cir. 2010) (citing Jackson v.
16 Virginia, 443 U.S. 307, 318-19 (1979)). Rather, when "faced with a
17 record of historical facts that supports conflicting inferences" a
18 reviewing court "must presume even if it does not affirmatively
19 appear in the record that the trier of fact resolved any such
20 conflicts in favor of the prosecution, and must defer to that
21 resolution." Jackson v. Virginia, 443 U.S. 307, 326 (1979). Put
22 another way, the Court may not acquit under Rule 29 simply because
23 innocent explanations exist with respect to the interpretation of
24 evidence. Nevils, 598 F.3d at 1164.

25 **B. The Evidence Was Sufficient to Sustain the Jury's**
26 **Conviction on Count One**

27 Any rational trier of fact could have found that the prosecution
28 introduced evidence beyond a reasonable doubt for each of the

1 essential elements of Count 1 charging a violation of 18 U.S.C.
2 § 875(d). In the Motion, defendant claims that no rational fact-
3 finder could conclude that there was sufficient evidence for the
4 first element of § 875(d) because there was no objectively reasonable
5 threat to harm Victim's reputation. (Mot., 7- 8.) To the contrary,
6 the evidence showed that defendant's threats to Victim's reputation
7 were unequivocal beyond what is typical in most § 875(d) cases.

8 1. Jury Instruction No. 12 Defines "True Threat"

9 In connection with Count One, the Court gave Jury Instruction
10 No. 12. (Dkt. 272, 12.) The instruction outlined the first element
11 for Count One as follows: "the defendant knowingly transmitted in
12 interstate or foreign commerce a communication containing a wrongful
13 and true threat to injure the reputation of another, in this case
14 Donald Burns." The instruction goes on to explain that a "true
15 threat" must meet both an objective and subjective standard. (Id.)
16 As to the "objective standard, a true threat is one that would be
17 understood by reasonable people hearing or reading it in context as a
18 serious expression of an intent to injure the reputation of another,
19 in this case Donald Burns." (Id.) (emphases added).

20 Here, defendant specifically wrote about his intent to injure
21 the reputation of the Victim in the text messages when defendant
22 made statements in text like: (1) "Be wise on How you reply. I can
23 bring your house down," (2) "I do have a twitter ... Lies can be made
24 more Maybe it's the truth," (3) "Check my twitter, the conversation
25 will grown and questions will be asked," and (4) "I can't get
26 friendship anymore, because who will want to be friends with black
27 mail . . . Money won't wash away What people will read and see of
28 you. Wow I guess I hold the cards right now." (Ex. 108, Items 377,

1 376, 349, 345). Defendant's texts qualify as "true threats" under the
2 objective standard because any reasonable person reading these texts
3 can comprehend a serious expression of intent to injure the
4 reputation of the Victim. This is particularly true when these
5 statements are taken in context of the pay-for-sex arrangement
6 between the defendant and the Victim, the Victim's status in his
7 community, and the fact that defendant was threatening to embellish
8 on truths in Twitter postings.

9 2. Context Confirms Existence of "True Threats"

10 The context surrounding the text messages confirm that they were
11 "true threats" under the objective standard articulated in Jury
12 Instruction 12. The Victim in this case is a millionaire, who sits
13 on the magicJack board as Chairman, serves as the president of a
14 charitable foundation, and engages in countless business and banking
15 relationships. (RT, 296-2, 78:21-24, 296-3, 37:6-18). He lives in
16 relatively small communities and lived a life that his community
17 respected for nearly 50 years. (RT, 296-3, 37:6-18). It was not
18 until 2013 that the Victim began actively engaging in group
19 prostitution. (RT, 296-2, 118:6-7). The Victim attempted to keep
20 this aspect of his life secret and segregated from his personal and
21 business life. He used a special email, argomediallc@gmail.com, to
22 communicate about the sex meetings and referrals. (RT, 296-2,
23 123:12-124:4.) He introduced people to his companion, Mr. Amadon,
24 but only told a select few that Mr. Amadon was a former pornography
25 actor and told no one that they had met through prostitution. (RT,
26 296-3, 66:11-67:4). According to the Victim, none of his peers or
27 family knew about his group-sex meetings or his payments for sex.
28 (RT, 296-3, 67:4). The prostitution and group sex was a secret that

1 the Victim kept from his circle of friends and business associates -
2 a different community from the gay pornography community he had been
3 soliciting.

4 Defendant argues that a reasonable person who was concerned for
5 his reputation would not ask pornography actors to recruit other
6 pornography actors to the meetings and would not pursue actors who
7 previously refused the Victim because there was no way to control
8 their discretion. (Mot., 9). Defendant claims that there was nothing
9 keeping such actors from discussing the encounters or posting
10 something on the internet. (Id.)

11 Whether the Victim's reputation was already "at risk" of being
12 harm is irrelevant. Defendant was the first actor to explicitly
13 threaten such harm. The objective standard applicable to a "true
14 threat" and Count One inquires whether the statement communicates an
15 "intent to injure reputation that can be comprehended by a reasonable
16 person;" the test does not require that a defendant be capable of
17 ruining reputation nor does it require that a reputation be pristine
18 before a threat occurs. (Dkt. 272, 12) Because the threat itself is
19 the crime, a defendant can be guilty of a violation regarding threats
20 even when he is incapable of carrying out the threat. United States
21 v. Romo, 413 F.3d 1044, 1052 (9th Cir. 2005).

22 The correct vantage point, therefore, under the "true threat"
23 objective standard is whether a reasonable person reading the
24 messages in context would interpret them as a serious expression of
25 an intent to injure the Victim's reputation - not whether the speaker
26 had an actual ability to injure a "good" reputation or the state of
27 the Victim's reputation. Typically, "true threat" caselaw focuses on
28 the relationship between the parties at the time of the threat,

1 events surrounding the threat, the effect the threat had on
2 listeners, as well as the tone and content of the communication. See
3 United States v. Pascucci, 943 F.2d 1032, 1036 (9th Cir. 1991)
4 (holding that there was sufficient evidence to support § 875(d)
5 conviction where the threat itself was "ambiguous" reasoning that
6 "the existence of a threat depends on the circumstances, which the
7 jury interprets" by drawing inferences from statements and by
8 assessing the tone and content of statements); United States v.
9 Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) ("alleged
10 threats should be considered in light of their entire factual
11 context, including the surrounding events and reaction of the
12 listeners").

13 In the instant matter, the relevant context the Court must
14 consider confirms the extortion. The Victim had just cut off his
15 "arrangement" with defendant after the lost-referral incident in
16 January 2015 and suggested they "call each other assholes" and "put
17 it behind them." (Ex. 108, Items 351, 377.) Instead of putting the
18 disagreement behind him, defendant sent threats to bring the Victim's
19 house down. The Victim testified about the effect the text messages
20 had on him - he was chilled and scared. (RT, 296-2, 105:7-8.)
21 Griggs also understood the threats as defendant's attempt to rob the
22 Victim. (RT, 296-3, 88:15-17). Yim testified that defendant told Yim
23 he was "blackmailing" the Victim. (RT, 296-4, 96:4.) The text
24 messages themselves characterize the communications as blackmail and
25 extortion. (Ex. 108, Items 345, 313.) The tone of the messages was
26 hostile, not playful. All of the evidence adduced at trial confirmed
27 that defendant was transmitting "true threats," in that any
28 reasonable person could find that defendant intended to communicate

1 serious intent to harm reputation. Thus, any rational fact-finder
2 could find that the text messages qualify as true threats under the
3 objective standard relevant to element one of Count One.

4
5 3. Defendant Had the Ability to Actually Harm Victim's Reputation

6 Here, of course, defendant had both intent and an ability to
7 injure the Victim's reputation, notwithstanding defense advocacy to
8 the contrary. The defendant had a significant Twitter following.
9 Defendant threatened to publish embarrassing, shameful truths and/or
10 lies. The Victim's paid sexual activity began less than two years
11 before the threats, but the Victim testified that beforehand he had
12 spent years building an "impeccable reputation in the communities
13 that I worked in, with the people I did business with, and with
14 friends and family." (RT, 296-3, 36:13-16.) Lies and exposure of
15 embarrassing truths would have been damaging to the Victim, who
16 believed that he had managed to segregate his prostitution from his
17 day-to-day life. Although defendant notes that some pornography
18 actors knew about the Victim's activities, this was not the relevant
19 community the Victim highlighted in his testimony as his peers. The
20 Victim was focused on his reputation in his community of friends and
21 business associates. (RT, 296-3, 67:4.) The Victim testified that,
22 as far as he knew, he had successfully segregated the prostitution
23 activity from his family, friends, and business associates. The
24 defense provided no evidence to the contrary at trial. As such, the
25 Court should accept the jury's assessment of the Victim's credibility
26 in this regard and resolve defendant's allegations about conflicting
27 inferences in favor the prosecution. Nevils, 598 F.3d at 1164.

1 The fact that certain individuals knew about the prostitution
2 did not nullify defendant's threats to lie about and further expose
3 to the broader public by posting on social media. Indeed, case law
4 interpreting violations of 18 U.S.C. § 875(d) has often involved
5 factual scenarios in which some individuals already knew about a
6 victim's secret which defendant was threatening to further expose.
7 See Pascucci, 943 F.2d at 1034 (9th Cir. 1991) (defendant had already
8 disclosed facts about the sex scandal at issue to victim's wife
9 before threaten to publicize this information to victim's employer);
10 United States v. Jackson, 180 F.3d 55 (2d Cir. 1999) (several people,
11 including defendant's family and Bill Cosby's business manager, knew
12 about Bill Cosby's extra-marital affair, which was the basis of
13 reputational threat).

14 So, even if the Victim had put his own reputation at risk among
15 pornography actors, this fact does not nullify, normalize, or negate
16 defendant's threats to further expose the Victim to the general
17 public and the society in which Victim navigated. Under the "true
18 threat" objective standard all that is required is that a reasonable
19 person reading the texts in context would consider them to be serious
20 expressions of an intent to injure the Victim's reputation. See Jury
21 Instr. 12. The standard does not require that the Victim have a
22 perfect reputation before the threat occurred.

23 Furthermore, the Victim's association with young attractive men
24 in the pornography industry is inapposite. Defendant argues that the
25 group sex meetings, the Victim's invitation for pornography filming
26 in his home, and association with Mr. Amadon are all somehow
27 inconsistent with any concern for his reputation. (Mot., 10-11).
28 This argument blatantly ignores the Victim's testimony. The Victim

1 hid the prostitution but did not hide his association with young men.
2 A large age-gap between companions was common in his community.
3 Association with young men or even pornography actors was not
4 equivalent to group prostitution - which was different and illegal.
5 Defendant's threats were "true threats" in that any reasonable person
6 could comprehend that defendant intended to threaten reputational
7 harm. Thus, defendant's Motion with respect to Count One must be
8 denied.

9
10 **C. The Evidence Was Sufficient to Sustain the Jury's
Conviction on Counts Two and Five**

11 Any rational fact-finder could conclude from evidence adduced at
12 trial that defendant extorted Victim on February 16, 2015, and
13 attempted to extort Victim again on March 3, 2015, as charged in
14 Counts Two and Five.

15 Defendant has alleged that the government failed to present
16 sufficient evidence in support of element one for each of these
17 counts (Mot. 8, 11.) Specifically, defendant claims that there was
18 not sufficient evidence adduced at trial that the Victim was induced
19 to part with property because the Victim's fear of reputational harm
20 was unreasonable. (Mot., 11.) Defendant is incorrect.

21
22 1. Jury Instructions 13 and 15 Do Not Require True
Threats

23 The relevant jury instruction for Counts Two and Five are Jury
24 Instruction Numbers 13 and 15, which provides that element one for
25 each offense is that "defendant induced (or attempted to induce) the
26 Victim to part with property by wrongful use of fear, specifically
27 wrongful threat of reputational harm." (Dkt. 272, 13, 15.) The
28 Court's previous definition for "true threat" and the objective

1 standard discussed above is absent from, and inapplicable to, these
2 jury instructions regarding Counts Two and Five.

3 2. The Victim Had Reasonable Fear of Reputational Harm

4 The Hobbs Act extortion conviction under Count Two, for
5 completed extortion, only requires proof that the Victim possessed
6 "reasonable fear" of harm and defendant exploited the fear. United
7 States v. Marsh, 26 F.3d 1496, 1500-01 (9th Cir. 1994); see United
8 States v. Lisinski, 728 F.2d 887, 891-92 (1984). Case law is clear,
9 however, that the decisive question under the Hobbs Act is whether a
10 defendant intended to cause a victim to part with money or property
11 by exploiting fear. Lisinski, 728 F.2d at 891-92.

12 The evidence is overwhelming in this case that the Victim's fear
13 was "reasonable" for all of the reasons stated above regarding Count
14 One. The Victim's fear was reasonable because postings on the
15 Internet about the Victim's participation in prostitution, and any
16 related embellishments or lies, could have quickly spread and would
17 have affected his reputation among his personal friends, business
18 associates, and banking relationships. The fact that the initial
19 warning tweet resulted in a re-tweet almost immediately demonstrated
20 how quickly information about the Victim migrated online. This could
21 quickly damage his business and personal prospects, thus, his fear of
22 exposure or defamation by defendant was "reasonable" fear.

23 Most importantly, the Victim's fear induced the Victim to part
24 with \$500,000 and his Audi r8 in February 2015, because he felt like
25 he had no "bargaining power" and had to act quickly to prevent
26 further spread of information on the internet. (RT, 296-2, 101:18-23,
27 102:7-14, 104:7-12, 111:4-8.) The Victim specified that the property
28 he turned over was neither gift (RT, 296-2, 116:22) nor payment for

1 past debts (RT, 296-2, 123:5.) The only inducement which caused the
2 Victim to part with his property was the threat of reputational harm.

3
4 3. Defendant Attempted to Exploit Victim's Fear of
5 Reputational Harm

6 Attempted extortion under the Hobbs Act, unlike completed
7 extortion, does not require evidence of reasonable fear. Attempted
8 extortion focuses only on a defendant's state of mind and whether a
9 defendant attempted to exploit fear. United States v. Ward, 914 F.2d
10 1340, 1347 (9th Cir. 1990). That being so, the Victim's state of
11 mind is never relevant in attempted extortion. Id.

12 In United States v. Marsh, 26 F.3d 1496, 1501 (9th Cir. 1994),
13 for example, the Ninth Circuit affirmed a conviction for attempted
14 extortion under the Hobbs Act where a defendant threatened to call a
15 victim's clients unless defendant's demands were met. Id. Marsh,
16 like this case, involved a gay victim who had previously paid
17 defendant for sex. Id. However, unlike this case, that relationship
18 developed into a 24-year friendship in which victim regularly
19 supported defendant financially. Id. at 1498. Marsh was indicted
20 for threatening to kill the victim and for threatening economic harm.
21 Id. The Ninth Circuit affirmed the jury's conviction for attempted
22 economic harm extortion reasoning that a rational fact-finder could
23 interpret defendant's statements as threatening economic harm even
24 though the Victim never testified about fear of economic harm at
25 trial. Id., at 1501. Furthermore, the conviction was affirmed even
26 though defendant no longer had a viable business at the time of the
27 extortion. Id. at 1504. The key was defendant's intent to exploit
28 his victim's fear, regardless of the Victim's actual fear or whether
it was reasonable. The court added that, in interpreting threatening

1 statements, the court should give considerable deference to juries.
2 Id. at 1501. See also Ward, 914 F.2d at 1347 (affirming conviction
3 for attempted extortion reasoning that "victim's state of mind was
4 not important" where victim found out defendant was a fraud before
5 making a payment in an undercover operation).

6 Here, regardless of whether Victim's fear was reasonable, the
7 evidence at trial was ample that defendant attempted to exploit the
8 Victim's fear for his own profit. The content of the texts
9 themselves targeted Victim's reputation and Victim's fear for his
10 reputation, demonstrating intent to exploit Victim's fear. (Ex. 108,
11 376). Defendant told Yim that he was blackmailing the Victim,
12 essentially admitting he was exploiting the Victim's fear of
13 exposure. (RT, 296-4, 96:15.) Even better than the Marsh case, the
14 Victim in this case testified at length about his fear of the harm
15 charged in the indictment, i.e., reputational harm. The Victim
16 explained that his fear remained during the attempted extortion that
17 took place via text in front of the FBI on March 3, 2015. (RT, 296-3,
18 33:20-23). The attempted extortion analysis only requires
19 defendant's intent to exploit such fear - not that Victim's fear be
20 reasonable. Thus, even if the Court were to find the Victim's fear
21 unreasonable due to his prior risk of exposure generally, the
22 evidence is still sufficient to support a conviction for attempted
23 extortion because defendant aimed to exploit the Victim's fear
24 further in attempt to obtain \$1 million.

25 **IV. CONCLUSION**

26 For the foregoing reasons, the government respectfully requests
27 that this Court deny defendant's renewed motion for judgments of
28 acquittal.