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BY ECF

The Honorable Rachel P. Kovner
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *United States v. Gentile, et al.*,
21 Cr. 054 (RPK) (PK)

Dear Judge Kovner:

We write on behalf of our client, David Gentile, in response to the Court's instruction on July 8, 2024 that Defendants may put in a letter argument with respect to certain alleged statements made by Mr. Prestiano—an unindicted coconspirator[1]—which the Court has indicated it believes may be relevant "in order for the Government to establish a conspiracy." *See* Tr. at 2341:5-9. For the reasons set forth below, Mr. Prestiano's statements should not be admitted. These statements are inadmissible hearsay for which no exception applies, including Rule 803(3)'s "state of mind" exception. These statements are also irrelevant, and any probative value they offer is vastly outweighed by the resulting unfair prejudice to the Defendants.

[1] Defendants continue to object to the Government's naming of Mr. Prestiano as an unindicted coconspirator for the first time mid-way through trial. *See* Dkt. No. 396 at 8. While the Government contends that on May 6, 2024, it merely provided Defendants with a "not exclusive" list of coconspirators (a contention Defendants also dispute), this list did not include Mr. Prestiano. Meanwhile, the Government balked when Mr. Prestiano was included on Defendants' witness list. Defendants submit that withholding this information ***several weeks into trial*** is plainly improper. *See, e.g.*, *United States v. Nachamie,* 91 F. Supp. 2d 565, 573 (S.D.N.Y. 2000) (compelling the government to provide names of unindicted coconspirators where the government "in order to prevent unfair surprise and ***enable defendants to prepare for trial***" (emphasis added)). The alleged conspiracy appears to expand depending on the evidentiary needs of the Government.

I. Introduction

The alleged statements by Mr. Prestiano at issue are described by the Government in their letter motion *in limine* as follows:

> (1) "[s]hortly after the 2015 Performance Guarantee was executed, Mr. Prestiano alluded to the fraudulent nature of the guarantee, and told Lash he should not have signed it and that it would cause problems down the road because too many people were aware of the circumstances of the 2015 Performance Guarantee's creation" ("**Prestiano Statement 1**"); and
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> (2) "Shortly after the government executed a search warrant at GPB's premises on February 28, 2019, Mr. Prestiano contacted Lash in a panic, stated that they were bad actors (or the government believed they were bad actors) and asked for Lash's help. Lash understood Mr. Prestiano to be concerned the government would learn of the details of the performance guarantees"[2] ("**Prestiano Statement 2**") (together, the "**Prestiano Statements**").

Dkt. No. 394 at 2. The Court rejected the Government's argument that the Prestiano Statements were admissible under Rule 801(d)(2)(E) as statements made in furtherance of the alleged conspiracy. *See* Tr. at 2320:14-15 ("I don't think it's in furtherance [of the conspiracy] if that's all it is [offered for]."). The Court also rejected the Government's argument that Prestiano Statement 2, which was made following the execution of a search warrant at GPB's offices, constituted an excited utterance under Rule 803(2). *Id.* at 2338:20-2339:2 (statement not an excited utterance because government's theory was not about truth of the statement). The Court suggested that the Prestiano Statements may be admissible as relevant to the *mens rea* of an unindicted coconspirator, Mr. Prestiano. *Id.* at 2341:5-9.[3] We respectfully submit that conclusion is incorrect.

II. Applicable Law

Rule 803(3) excepts from the general rule excluding hearsay "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition" but the exception does "not includ[e] a statement of memory or belief to prove the fact remembered or believed." Fed. R. Evid. 803(3). To be admissible under this exception, the hearsay declarant's state of mind must be relevant to the case. *Amerisource Corp. v. RxUSA Int'l Inc.*, No. 02-CV-2514 (JMA), 2009

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[2] The Government's own account of this alleged conversation is inconsistently memorialized in their notes of interviews of Mr. Lash. For example, in the Filter Team 302, and the Government's letter, the Government describes the conversation between Mr. Lash and Mr. Prestiano as occurring "shortly after" the government executed a search warrant on GPB's premises. *See* Dkt. No. 394 at 2. In the Prosecutorial Team's debrief of Mr. Lash, however, Mr. Lash describes the conversation with Mr. Prestiano as having occurred "a day or two" after Mr. Lash had learned from a third party about the search of GPB's offices. 3500-JLA-27-A at -001. For the reasons set forth below, the time period between the search of GPB's offices and the alleged conversation between Mr. Lash and Mr. Prestiano further undercuts the applicability of FRE 803(3)'s state of mind exception to the rule against hearsay.

[3] The Court also noted that the statements were "offered for Mr. Prestiano's state of mind and it seems admissible for that reason." *Id.* at 2342:5-9.

WL 235648, at *2 (E.D.N.Y. Jan. 30, 2009). The "state of mind exception" requires that "the statement be contemporaneous to the event sought to be proved." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288(DLC), 2005 WL 375315, at *9 n.9 (S.D.N.Y. Feb.17, 2005) (citing *United States v. Cardascia*, 951 F.2d 474, 488 (2d Cir.1991)). To be admitted under this rule, "the statement must face forward, rather than backward." *United States v. Harwood*, 998 F.2d 91, 98 (2d Cir. 1993). The reasons for the exception "focus on the contemporaneity of the statement and the unlikelihood of deliberate or conscious misrepresentation." *Id*. Thus, to fall within the "state of mind" exception, "the statements sought to be introduced must relate to the declarant's state of mind ***during*** the [allegedly illegal conduct]" and not what the declarant "said or did after the [allegedly illegal conduct] had taken place and as the scheme itself was being discovered." *United States v. Netschi*, 511 F. App'x 58, 61 (2d Cir. 2013) (affirming district court's exclusion of statements the defendant "made and reactions he had concerning the unraveling of the scheme") (emphasis added).

III. Argument

A. The Prestiano Statements Are Not Admissible Under Rule 803(3)

Under this rubric, the Prestiano Statements are not admissible. As a threshold matter, evidence is only admissible under Rule 803(3) as to the ***declarant's*** state of mind, and cannot be admitted as evidence of another person's—in this case, Mr. Gentile's—state of mind. *United States v. Zapata*, 369 F. Supp. 2d 454, 459 (S.D.N.Y. 2005) ("The statements are not admissible under the Rule to prove [Defendant's] then-existing state of mind, as she was not the declarant."); *United States v. DiMaria*, 727 F.2d 265, 270–71 (2d Cir. 1984) (noting that where a statement concerns a past act performed by someone other than the speaker, the statement cannot be admitted under Rule 803(3)); *United States v. Gomez*, 927 F.2d 1530, 1536 (11th Cir. 1991) (upholding district court's rejection of testimony under Rule 803(3) where it was offered to show defendant's state of mind, but the statement was made by a coconspirator). Accordingly, Mr. Prestiano's statements to Mr. Lash may not come in as relevant to Mr. Gentile's state of mind, and must be relevant in and of themselves in order to be admissible.[4]

Moreover, Prestiano Statement 1—Mr. Prestiano's alleged statement to Mr. Lash "allud[ing] to the fraudulent nature of the [2015 performance] guarantee" in which he allegedly told Mr. Lash that "he should not have signed it"—is prohibited under the plain language of Rule 803(3). The Government concedes that the statement is offered to establish Mr. Prestiano's "belief that [the 2015 performance guarantee] was fraudulent." Tr. at 2310:12-19. But Rule 803(3) expressly excludes from the exception "a statement of memory or belief to prove the fact

[4] The Second Circuit held in *United States v. McPartland*, that "[e]vidence of a co-conspirator's state of mind ***may be relevant*** to explain how a criminal enterprise developed, to help the jury understand the basis for the coconspirators' relationship of mutual trust, or to complete the story of the crime on trial." 81 F.4th 101, 115 (2d Cir. 2023) (emphasis added). That case dealt with fear of retaliation testimony. *Id*. As such, the court did not analyze the statements under Rule 803(3), but relied on two cases permitting such evidence under Rule 404(b). *See id.* (citing *United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996); *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir. 1997)). Here, Mr. Prestiano's statements cannot be offered as such, as they are not qualifying crimes, wrongs, or acts. The "state of mind" exception is not a *per se* admissibility pass for hearsay statements of alleged coconspirators against indicted defendants.

remembered or believed." Fed. R. Evid. 803(3). Based on this limitation to the exception, courts have consistently held that Rule 803(3) "does not permit the witness to relate any of the declarant's statements as to why [the declarant] held the particular state of mind, or what [the declarant] might have believed that would have induced the state of mind." *Amerisource Corp. v. RxUSA Int'l Inc.*, No. 02-CV-2514 (JMA), 2009 WL 235648, at *2 (E.D.N.Y. Jan. 30, 2009) (citing *United States v. Joe*, 8 F.3d 1488, 1493 (10th Cir.1993)).

Neither of the Prestiano Statements satisfy Rule 803(3)'s contemporaneity requirement. Prestiano Statement 2—in which Mr. Prestiano supposedly called Mr. Lash in a panic asking for help—took place in February 2019, long after the alleged conspiracy and, by Mr. Lash's own admission, "a day or two" after he had learned of the search of GPB's offices. 3500-JLA-27-A at -001. This puts the statement outside of the "state of mind" exception. *See Harwood*, 998 F.2d at 97–98 (upholding exclusion of a statement reflecting the declarant's memory of conduct that had occurred five months earlier); *Cardascia*, 951 F.2d at 486 (upholding exclusion of a resignation letter reflecting declarant's memory of his alleged state of mind during conduct that had occurred six months earlier). Here, the statement does not relate to Mr. Prestiano's state of mind ***during*** the allegedly conspiracy, but instead is what Mr. Prestiano "said or did after the [allegedly illegal conduct] had taken place and as the scheme itself was being discovered." *Netschi*, 511 F. App'x at 61. These statements and reactions Mr. Prestiano had "concerning the unraveling of the scheme" are not admissible. *Id.*; *see also United States v. Lawal*, 736 F.2d 5, 8 (2d Cir. 1984) ("[T]o the extent that the declarations excluded by the trial court's rulings were not statements exhibiting [defendant's] then existing state of mind, but were instead statements of what he or someone else had done in the past, they would be properly excludable as inadmissible hearsay not within the terms of Rule 803(3).").

The same goes for Prestiano Statement 1. While the Government does not indicate when the alleged statement by Mr. Prestiano was made to Mr. Lash, it impliedly concedes that the statement was not made contemporaneously with Mr. Lash signing the agreement. *See* Dkt. No. 394 at 2 (Mr. Prestiano's statement to Mr. Lash was made "[s]hortly after the 2015 Performance Guarantee was executed"). Given Rule 803(3)'s contemporaneity requirement, a statement of Mr. Prestiano's then-existing state of mind cannot be offered to prove that he had that same state of mind when Mr. Lash signed the agreement. *See United States v. Taubman*, 297 F.3d 161, 164-165 (2d Cir. 2002) (holding that a statement made about a meeting immediately after the meeting had concluded did not satisfy the requirements of Rule 803(3) as it was "not made contemporaneously with [the] meeting"); *United States v. Mohamed*, No. 18-CR-603 (ARR), 2022 WL 15493545, at *5 (E.D.N.Y. Oct. 26, 2022) ("[A] statement of Mr. Mohamed's then-existing state of mind cannot be offered to prove that he had the same state of mind in the past.").

In sum, the Prestiano Statements do not satisfy Rule 803(3)'s stated requirement for assuring reliability: contemporaneity. As the court explained in *United States v. Cosentino*, 581 F. Supp. 600, 602 (E.D.N.Y. 1984), statements of a past state of mind are inadmissible because they involve hearsay risks that do not exist with statements of a then-existing state of mind:

> There is, accordingly, a radical distinction between the statement: "I hate X" (admissible under FRE 803(3)) and the statement: "last year I hated X" (inadmissible). In the former statement the only serious hearsay risk is that the

> declarant is lying. In the latter, all the hearsay risks are present: the declarant may misperceive the state of mind he possessed one year ago; and his recollection may have dimmed over the year, and he may be lying.

Id. at 602. Here, to admit the Prestiano Statements, which are not contemporaneous with the mental state sought to be proven (Mr. Prestiano's "belief that [the 2015 performance guarantee] was fraudulent," according to the Government), would allow the Rule 803(3) "exception to swallow the rule." *Mohamed*, 2022 WL 15493545, at *5.

B. The Prestiano Statements Are Not Admissible to Prove the Existence of the Charged Conspiracy and Are Cumulative Under Rule 403

The Court suggested that Mr. Prestiano's statements as a coconspirator may be admissible to prove the existence of the charged conspiracy, but Defendants respectfully submit that this circular logic does not comport with Rule 803(3), or any other rule governing the proper admissibility of evidence. Indeed, the admissibility of a coconspirator's statements are typically couched in Rule 801(d)(2)(E), which requires the Government prove by a preponderance of the evidence "(1) that there was a conspiracy, (2) that its members included the declarant and the party against whom the statement is offered, and (3) that the statement was made both (a) during the course of and (b) in furtherance of the conspiracy." *United States v. Saneaux*, 365 F. Supp. 2d 493, 497 (S.D.N.Y. 2005). What the Court has suggested—that statements made by an alleged coconspirator may be admitted into evidence as relevant to prove the existence of a conspiracy—effectively turns Rule 801(d)(2)(E) on its head. Rather than require the Government to establish that there was a conspiracy in order to admit the statements, under the Court's reasoning, the Government may do precisely the opposite.

Nor are the Prestiano Statements—and their bearing on Mr. Prestiano's state of mind—relevant to the existence of the charged conspiracy, even if they were admissible (they are not). With respect to Prestiano Statement 1, whether Mr. Prestiano believed or did not believe that Mr. Lash should have signed the 2015 Performance Guarantee does not have any bearing as to the existence of the underlying charged conspiracy. Nor does this purported belief make his membership in the underlying conspiracy any more or less probable. The same can be said with respect to Prestiano Statement 2: Prestiano's state of mind when he allegedly called Mr. Lash "in a panic" after the FBI raided GPB's offices in February 2019 (after the end of the conspiracy) does nothing to establish the existence of the underlying conspiracy from 2015-2018. Nor does his "panic" make his membership in the underlying conspiracy more or less probable. As the Court correctly observed, anybody would be "panicked if the Government had raided their office and [] thought that the Government was communicating that you were a bad actor." Tr. at 2339:5-12.

Further, Mr. Prestiano's alleged statements are cumulative under Rule 403. While Mr. Lash may testify that he was a member of the alleged conspiracy and as to other coconspirator's actions pursuant to the conspiracy based on his own personal knowledge, this does not require the introduction through Mr. Lash of improper hearsay, the declarant of which Defendants will have no opportunity to cross-examine.

C. The Prestiano Statements Implicate Confrontation Clause Issues

Defendants' concerns with respect to the Prestiano Statements as offered through Mr. Lash are further compounded by the fact that Mr. Prestiano will not be a testifying witness at trial. As explained above, Mr. Prestiano's statements do not meet Rule 803(3)'s standards for reliability, which exacerbates the existing Confrontation Clause issues. *Contra United States v. Valentine*, 644 F. Supp. 818, 821 n.2 (S.D.N.Y. 1986) ("[Rule] 803(3) statements have long been seen as having indicia of reliability sufficient to avoid Confrontation Clause issues."). Even so, "a defendant may object on the ground of probable unreliability to admission of a declaration of a nonwitness which is within an exception to the hearsay rule or is not hearsay." *United States v. Harris*, 733 F.2d 994, 1005 (2d Cir. 1984).

IV. Conclusion

For these reasons, and those raised in Defendants' prior oppositions and sur-reply briefs, the Government's motion *in limine* to admit the Prestiano Statements through Mr. Lash should be denied.

Respectfully submitted,

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