



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

JAM/JKW/NMA/KM
F. #2018R01064

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May 17, 2024

By ECF

The Honorable Rachel P. Kovner
United States District Court
Eastern District of New York
Brooklyn, New York 11201

Re: United States v. Gentile, et al.
Criminal Docket No. 21-54 (RPK)

Dear Judge Kovner:

The government respectfully submits this letter motion in limine to preclude the defendants from relying on the presence or involvement of attorneys to suggest that they acted in good faith. The defendants have represented that they do not intend to assert a formal advice-of-counsel defense at trial. Instead, the defendants seek to introduce emails involving in-house and outside counsel for GPB Capital Holdings LLC (“GPB”)—many of which emails the defendants are not even copied on—for the apparent improper purpose of suggesting that lawyers were involved in and blessed investor-facing documents and disclosures. As set forth in greater detail below, these emails are hearsay, irrelevant to the defendants’ own states of mind, and likely to confuse and mislead the jury. Their introduction would unduly prejudice the government’s case. This Court should join the multiple other courts in this Circuit that have precluded defendants’ improper efforts to gain the benefit of an **advice-of-counsel defense** without meeting the showing required to formally offer such a defense. The government therefore respectfully requests that the Court preclude evidence and argument, including in opening statements, that the presence or involvement of lawyers is relevant to the defendants’ intent.

I. Background

On May 1, 2024, the defendants filed their preliminary witness list, which includes GPB in-house attorney James Prestiano. ECF Dkt. No. 297-2 at 2. On May 7, 2024, they provided an initial index of trial exhibits, which includes various emails involving Mr. Prestiano, several hundred emails involving Jeffrey Schultz and Daniel Diamond—both former in-house attorneys and Chief Compliance Officers at GPB—and, among those emails, several exchanges with GPB outside counsel at Proskauer Rose LLP (“Proskauer”) and Ropes & Gray LLP (“Ropes & Gray”). The bulk of these emails appear to include at least one or more employees of third-party company Ascendant Capital LLC (“Ascendant”), which served as the placement agent and marketing firm

for the GPB investment funds. ECF Dkt. No. 1 ¶ 6. Despite including emails from Mr. Schultz and Mr. Diamond, the defendants did not notice either as potential witnesses.

Following these disclosures, on May 8, 2024, the government wrote to defense counsel to inquire whether the defendants intend to invoke an advice-of-counsel defense at trial and, if not, to request that the defense proffer the contours of Mr. Prestiano’s expected testimony and the purpose of the emails from Mr. Schultz. In their response on May 9, 2024, the defendants represented that they do not intend to assert an advice-of-counsel defense at trial but declined to provide any detail regarding Mr. Prestiano’s testimony or the purpose of Mr. Schultz’s emails.

On May 14, 2024, having been provided hundreds of emails that include GPB attorneys, the government contacted outside counsel for GPB to confirm whether the emails are, in fact, not privileged. On May 15, 2024, GPB confirmed that any emails involving Ascendant that pre-date mid-March 2018 are not privileged. GPB also informed the government that, sometime in mid-March 2018, a common interest privilege arose between GPB and Ascendant in connection with ongoing litigation involving former GPB partner Patrick Dibre, and that Herrick Feinstein LLP represented both companies from late-May through mid-October 2018. GPB’s counsel did not identify the defendants as parties to any common interest agreement between GPB and Ascendant. Indeed, as the government has previously argued elsewhere, there is no evidence that any common interest relationship ever extended to the defendants in their individual capacities. See ECF Dkt. No. 298 at 13–18.

II. Legal Standard

To assert an advice-of-counsel defense, a defendant must show that, before acting, he in good faith sought the advice of counsel, fully and honestly laid all the material facts before the attorney, and strictly followed the attorney’s advice. E.g., United States v. Scully, 877 F.3d 464, 478 (2d Cir. 2017). Where, as here, such a showing is not made, courts in this Circuit routinely preclude defendants from otherwise relying on the presence, involvement, or participation of attorneys to argue good faith or lack of criminal intent, not only because this evidence is largely irrelevant in the absence of an actual advice-of-counsel defense, see Fed R. Evid. 401, but also because of the substantial likelihood that it will mislead the jury and unfairly prejudice the government; see Fed. R. Evid 403; see, e.g., United States v. Bankman-Fried, No. 22-CR-673 (LAK), 2024 WL 477043, at *3–4 (S.D.N.Y. Feb. 7, 2024); S.E.C. v. Lek Sec. Corp., No. 17-CIV-1789 (DLC), 2019 WL 5703944, at *4 (S.D.N.Y. Nov. 5, 2019); S.E.C. v. Tourre, 950 F. Supp. 2d 666, 683–84 (S.D.N.Y. 2013); see also United States v. Sterritt, No. 21-CR-193 (KAM), 2023 WL 7386660, at *7–8 (E.D.N.Y. Nov. 8, 2023). As one court explained, “[i]t would be confusing and unduly prejudicial” for a defendant to introduce evidence “on the presence and involvement of lawyers—who are presumably paid to ensure that any disclosures comply with the relevant legal requirements—while at the same time professing not to have relied on their advice in preparing or disseminating those disclosures.” Tourre, 950 F. Supp. 2d at 684.

III. Argument

Although the defendants have disclaimed any formal advice-of-counsel defense, their pretrial disclosures to date signal that they will, nevertheless, attempt to rely on the presence

and involvement of attorneys in a misleading, confusing, and prejudicial manner.¹ The Court should not permit them to do so. Indeed, it should preclude any evidence or argument on this topic, as well as preclude the defendants from referring to the presence or involvement of attorneys in their opening statements.

The defendants' proposed trial exhibits include several hundred emails reflecting Mr. Schultz's, Mr. Diamond's, and Mr. Prestiano's involvement in reviewing various external-facing documents at GPB—from employee bios to marketing materials for GPB investment funds, including private placement memoranda (“PPMs”) disseminated to investors. *See, e.g.*, Ex. A (DX-WWE); Ex. B (DX-BBBBS); Ex. C (DX-FFFX); Ex. D (DX-JJK). They also include communications between certain of these in-house attorneys and GPB's outside counsel, seeking and receiving feedback on GPB fund marketing materials. In one email thread from May 2016, for example, Mr. Schultz sought input from GPB's outside counsel at Proskauer on an updated PPM and Limited Partnership Agreement (“LPA”) for GPB Automotive Portfolio, LP (“Automotive Portfolio”). *See* Ex. E (DX-WWN). Proskauer in turn provided comments on both the PPM and LPA. *Id.* In another from July 2018, Mr. Prestiano forwarded to employees at GPB and Ascendant a series of email exchanges with attorneys at Ropes & Gray, reflecting their input on a PPM supplement for GPB Holdings, LP (“Holdings I”). *See* Ex. F (DX-JJU). In this thread, outside counsel engaged with Mr. Prestiano and Mr. Diamond on which metric underlying the distribution coverage ratio, *i.e.*, Net Income or Net Investment Income, should be included in the Holdings I PPM supplement. *See id.* at JJU-009. The defendants' exhibits also include emails reflecting the supposed involvement of counsel in connection with at least one of the performance guarantees at issue in this case. In an email thread from April 2016, [REDACTED], wrote to Mr. Prestiano and others regarding the “performance guarantee”—“Let's discuss so we can coordinate the details on moving the money properly.” Ex. G (DX-VVV). Neither defendant is copied or otherwise included on any of these communications.

There is no proper basis for the defendants to introduce these emails at trial, and they should not be permitted to do so. Where, as here, the defendant does not assert an actual advice-of-counsel defense, evidence of the involvement of attorneys is irrelevant and, to the extent it has any relevance, that relevance “is substantially outweighed by the danger of unfair prejudice, confusing the issues, [and] misleading the jury.” Fed. R. Evid. 403. Courts have routinely precluded evidence regarding the presence and involvement of attorneys, like the GPB in-house attorneys and outside counsel identified above, because it has minimal, if any, probative value. *See Bankman-Fried*, 2024 WL 477043, at *3; *Tourre*, 950 F. Supp. 2d at 684. As these same decisions explain, this evidence is also highly likely to mislead and confuse the jury, and unduly prejudice the government. *See Bankman-Fried*, 2024 WL 477043, at *3; *Tourre*, 950 F. Supp. 2d at 684; *see* Fed. R. Evid. 403. As one court explained, “[a] lay jury could easily believe that the fact that a lawyer is present at a meeting means that he or she must have implicitly or explicitly ‘blessed’ the legality of all aspects of the transaction.” *Tourre*, 950 F. Supp. 2d at 684. “Likewise, the fact that lawyers saw and commented on disclosure language could be understood as ‘blessing’ the sufficiency of that disclosure.” *Id.* “This misunderstanding would give the defendant all of

¹ That the defendants intend to do so is also evident from their 2020 deposition testimony before the Securities and Exchange Commission, during which they repeatedly referenced the involvement of counsel. Across his two-day deposition, defendant Gentile raised the presence of and reliance on counsel dozens of times.

the essential benefits of an advice of counsel defense without having to bear the burden of proving any of the elements of the defense.” Id.; see id. (precluding evidence that could only be intended to suggest that counsel blessed relevant disclosures where defendant disclaimed formal advice-of-counsel defense).

For these same reasons, the court in Bankman-Fried, recently rejected the defendant’s attempt to argue that the involvement of attorneys in reviewing and approving, among other things, the formation of entities, loans to company founders, and intercompany agreements, was relevant to the defendant’s intent and gave him assurance that he was acting in good faith. See 2024 WL 477043, at *3–4. In doing so, the court held that, absent evidence that the defendant fully disclosed to the attorneys how he intended to use the entities, the source of the funds involved, or that the representations in the documents were actually false, the involvement of lawyers did not bear on any material issue at trial and, instead, would only cause juror confusion and unfair prejudice. See id. at *4. In both Bankman-Fried and Tourre, the court also precluded the defendants from referencing the involvement of attorneys in their opening statements. Id. at *2; Tourre, 950 F. Supp. 2d at 685.

Here, the defense exhibits described above are likely to mislead the jury by falsely implying that in-house attorneys or outside counsel at Proskauer, for example—with full knowledge of all the facts—blessed or otherwise approved the disclosures at the heart of this case, including in the PPMs and, by extension, the defendants’ charged conduct. In fact, there is no evidence that the defendants provided full and complete information to counsel regarding the distribution coverage ratios or the performance guarantees described in the indictment. Indeed, the emails neither suggest they did, nor do they contain the context necessary to determine what relevant information, if any, was conveyed to the attorneys in formulating their advice, the details of their advice, or even more fundamentally whether the advice of these attorneys was followed. The mere involvement of lawyers in reviewing some of the materials relevant to this case proves nothing, but could be interpreted by the jury to mean that the lawyers approved the defendants’ conduct with full knowledge of the facts. The potential to mislead the jury is why the advice-of-counsel defense has stringent requirements, which the defendants have made no attempt to meet.

For example, while the May 2016 email exchange with Proskauer shows that Mr. Schultz sought outside counsel’s comments on an updated PPM for Automotive Portfolio, nothing in that exchange sheds any light on what, if anything, was shared with attorneys at Proskauer about the information underlying the representations contained in the PPM on which to base any advice they might provide. See Ex. E (DX-WWN). The July 2018 exchange reflecting advice sought from Ropes & Gray regarding a Holdings I PPM supplement is likewise incomplete and misleading. Based on that exchange, see Ex. F (DX-JJJU), and subsequent internal communications regarding the advice provided by Ropes & Gray, see Ex. H (DX-JJJV), it appears that, following one or more conversations with Mr. Prestiano and Mr. Diamond, Ropes & Gray drafted the Holdings I PPM supplement to include certain language regarding Holdings I investor distributions, including that “[d]istributions are currently and may in the future be paid out of available working capital, including, but not limited to, investor contributions. To date, all distributions have been a return of investor capital” Ex. I (DX-JJJV-1 at 002).² This document

² This email was sent approximately three years after the defendants first made distributions from investor capital and more than three years after the defendants created a fraudulent performance guarantee to cover up

is particularly demonstrative of the misleading and prejudicial nature of these proposed exhibits. Whether the defendants falsely claimed to investors that distributions would be paid from cash flow from operations, when in fact they were paid from investor capital, is at the heart of the government's case. This document will lead the jury to believe that in-house counsel discussed that very issue with outside counsel and received counsel's blessing. Absent a formal advice-of-counsel defense accompanied by a waiver of privilege, the government has no ability to cross-examine any of the email participants on what information was disclosed to them, why this new disclosure was contemplated, and the degree to which it was implemented. And on their face, these documents say nothing about what information, if any, Mr. Prestiano, Mr. Diamond, or anyone else at GPB provided to the Ropes & Gray attorneys who ultimately drafted the PPM supplement, nor whether the attorneys' advice was actually followed. These communications will serve no other purpose than to mislead and confuse the jury.

The risk that the jury will be misled by these documents is only heightened by the fact that neither defendant is copied on many of the emails the defendants propose to admit. These emails are hearsay, but the defendants apparently intend to introduce them for their substance, to show attorneys reviewing and commenting on the marketing materials used by the defendants' employees without calling the attorneys or those employees as witnesses. There is no basis to infer the defendants' good faith from potential legal advice sought by and conveyed to other GPB or Ascendant employees. Given the minimal probative value of these emails as to the state of mind of the defendants, who are not copied on them, the purpose of these emails can be only to introduce the partial and unreliable version of the truth of the statements contained therein. These emails should be precluded not only because they are irrelevant and highly prejudicial under Rules 401 and 403, but also because they are hearsay under Rule 802.

The government will be unfairly prejudiced by these documents not only because they are highly misleading to the jury, but also because the government will be unable to effectively respond. To adequately respond to the misimpression created by these documents, the government would need access to the attorneys to be able to interview them, to communications with the attorneys on the relevant subjects, and to the underlying documents related to the alleged advice they provided, including whether it was actually followed. A significant portion of this information is likely privileged and has not been provided to the government—as the defendants have pointed out there are hundreds of thousands of documents obtained from GPB that have been withheld from the prosecution team on potential privilege grounds. Moreover, because the relevant privilege belongs to GPB, and not to either defendant, neither the government nor the defense can compel such a waiver. In the end, the government would be hamstrung, with no viable way to evaluate what information was disclosed to counsel, by whom, and when, and, as a result, no way to rebut the misleading impression in the mind of the jury that attorneys' involvement in

a profit shortfall in one of their funds. Shortly after this email, the defendants stopped accepting new subscriptions and suspended redemptions. That timing renders this email particularly confusing to a juror, who might infer that Ropes & Gray had been providing advice on this issue from the outset and had reviewed the defendants' prior disclosures. To the contrary, the reality may be that Ropes & Gray advised GPB that—in light of the source of capital for its distributions—its prior disclosures to investors were false and misleading, but absent a waiver of privilege the government has no ability to make such an inquiry and establish the actual facts surrounding this email.

