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May 24, 2024

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

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

Dear Judge Kovner:

Defendant David Gentile respectfully submits this letter in response to the Government's motion *in limine* seeking to preclude the Defendants from relying on the presence or involvement of attorneys to suggest that they acted in good faith. ECF No. 315 (the "Motion").[1] Defendant Jeffry Schneider joins in this response.

In this case, the Government argues that Gentile and Schneider are criminally responsible for certain supposedly false statements made in investor communications. [redacted] Defendants should not be precluded from introducing this evidence just because some of those individuals happen to be attorneys.

Evidence of [redacted] is highly relevant and exculpatory. [redacted] Yet, this is precisely the evidence that the

[1] Mr. Gentile has redacted his opposition because it contains reference to defense strategy and legal theories to which the Government is not entitled at this stage of the proceeding, specifically with respect to potential exhibits the defense may offer at trial, or testimony his counsel may elicit, depending upon evidence the Government actually offers in its case-in-chief.

Government by its Motion seeks to preclude. Moreover, the communications the Government seeks to preclude—which it has possessed for years and concedes are not privileged—are fair game, and neither Second Circuit case law nor the Federal Rules of Evidence warrant their exclusion. The Motion therefore should be denied.

1. **The Evidence the Government Seeks to Exclude is Relevant and Admissible to Establish that** [redacted]

The evidence the Government seeks to exclude is relevant and admissible because it [redacted] —which the Government placed at issue [redacted]. Without the ability to show that [redacted], the Defendants effectively would be prevented from confronting witnesses or defending against the allegations.

Defendants intend to offer the evidence the Government seeks to exclude to show that: [redacted] This evidence is highly relevant and should not be excluded.

a. The Evidence is Relevant to Establish That Defendants [redacted]

The Government asserts that GPB's disclosures—namely, the PPMs—are at the "heart of this case." Mot. at 4. Specifically, the Indictment alleges that the PPMs for Holdings I and Automotive Portfolio were amended in December 2016 to include language that GPB had "no present plans" to include investors' invested capital in distributions, despite that the funds were allegedly using investor funds to pay distributions at the time. Indictment ¶¶ 25-27, 32. The Indictment further alleges that this practice "was known to the defendants," *id.* ¶ 33, and that Defendants and "Ascendant employees *acting at their direction* represented that the source of funds used to pay distributions would" not include capital raised from investors, *id.* ¶ 21 (emphasis added).

The Government now seeks to prevent the defense from submitting evidence [redacted] The Government points to the fact that Gentile and Schneider are not on many of the emails with attorneys to argue that these communications are irrelevant and should therefore be excluded. Mot. at 5. But [redacted]

[redacted]

Exhibit E (DX-WWN, Email from Michael Orenstein to Brian Weisenberger, Jeffrey Schultz, and Peter Fass) to the Motion is illustrative. [redacted]

Exhibit G (DX-VVV, Email from Steven Frangioni to Michael Barbagallo and James Prestiano) to the Motion, which is related to the performance guarantees at issue, provides another instructive example. *See* Mot. at 3. This document shows Prestiano's discussions with outside counsel regarding "moving money properly" as related to the 2015 performance guarantees. [redacted] And, to the extent the Government intends to attack the 2015 guarantee as allegedly "backdated," Indictment ¶ 43, these communications are relevant to show [redacted][2]

[redacted]

b. The Evidence is Relevant to Establish that GPB and Ascendant [redacted]

Defendants may also seek to use the emails at issue to show [redacted] Indeed, the Government's exhibits to its letter motion are prime examples of this. *See e.g.,* Mot., Ex. B (DX-BBBBS, Email from Jeffrey Schultz to Michelle Agostine); Mot. Ex. C (DX-FFFX, Email from Daniel Diamond to Alejandro Almada); Mot. Ex. D (DX-JJJK, Email from Daniel Diamond to Michelle Agostine and James Prestiano).

[2] In any event, for the emails at issue, Prestiano is not advising on the propriety of the performance guarantees as a legal matter. His involvement in the drafting, accounting, disclosing, and collecting of the performance guarantees does not implicate advice of counsel, and the Government points to no examples showing otherwise.

The documents show that GPB and Ascendant [redacted] These documents are central to rebutting allegations about the alleged false statements in marketing materials, including the Government's claim that they [redacted]

The Government's Motion sweepingly seeks to exclude ***all*** emails including Jeffrey Schultz, Daniel Diamond, James Prestiano[3]—lawyers who worked for GPB in various capacities and not just as attorneys—or any outside counsel, while conceding that the emails in question are not privileged, according to conferrals with GPB's outside counsel. *See* Mot. at 2. Indeed, Diamond was the Chief Compliance Officer ("CCO"); Schultz was a Managing Director, Senior Counsel and CCO; and Prestiano was a Managing Director and Senior Counsel. Documents that include people who happen to also be attorneys cannot render them *per se* inadmissible. *See Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28, 38 (E.D.N.Y. 2013) (recognizing that "in-house counsel may serve both legal and business functions, and courts will scrutinize the nature of their communications before finding that those communications are privileged" and "[a]lthough outside counsel may be more independent and less likely to play dual roles, there is nevertheless no presumption that communications with outside counsel are privileged" (internal quotation marks omitted)), *aff'd*, 29 F. Supp. 3d 142 (E.D.N.Y. 2014).

[redacted] To exclude this relevant and highly probative evidence would not only distort the reality of what occurred during the charged time-period, but it also would be prejudicial to Defendants, while being unduly beneficial to the Government to be able to present such a lopsided and inaccurate narrative.

2. The Federal Rules of Evidence and Second Circuit Precedent Do Not Otherwise Require Exclusion of the At-Issue Documents

The Government contends that "[c]ourts have routinely precluded evidence regarding the presence and involvement of attorneys, like the GPB in-house attorneys and outside counsel[,]" because such evidence has "minimal, if any, probative value," is "highly likely to mislead and confuse the jury," and "unduly prejudice[s] the government." Mot. at 3. The Government is wrong, and its reliance on *SEC v. Tourre*, 950 F. Supp. 2d 666 (S.D.N.Y. 2013), and *United States v. Bankman-Fried*, 2024 WL 477043 (S.D.N.Y. 2024), is misplaced.

Bankman-Fried and *Tourre* engaged in fact-specific analyses as to each challenged piece of evidence and *permitted* the defense to introduce the challenged evidence in ways applicable

[3] The Government objects to Defendants' inclusion of communications involving Diamond and Schultz on their exhibit list, and the listing of Prestiano on their witness list, because they are all attorneys. Yet the Government itself listed Diamond, Scott Silverman (former Vice President and General Counsel of Prime Motor Group), and Roger Anscher (former Chief Operations Officer and General Counsel) in its initial witness list. The Government removed Diamond and Silverman from its revised list *after* the defense disclosed its exhibits and witnesses on May 1, and has kept Anscher on its witness list. In addition, hours before the filing of this letter, the Government added to its exhibit list numerous documents involving Schultz and Prestiano, attorneys named in the Government's Motion.

here, where the probative value was not substantially outweighed by unfair prejudice. In *Bankman-Fried*, the court excluded only the introduction of evidence of presence or use of counsel regarding events that were not relevant to the charged conduct, based on Rules 401 and 403. The court reasoned that such evidence:

> risk[ed] suggesting to the jury that, because lawyers were involved to some degree with one aspect of events, the defendant was entitled to conclude that he was acting within the law with respect to some other aspect of events. . . . These concerns are more likely to warrant exclusion where, as in this case, *the proffered evidence is only collaterally related to the charged conduct and is thus minimally probative*.

2024 WL 477043, at *3 (S.D.N.Y. Feb. 7, 2024) (emphasis added). The court excluded certain evidence only "because it pertained to lawyers' involvement in activities for which the defendant was not charged." *Id.*

[redacted]

These principles support the admissibility of the challenged evidence here. [redacted]

4. The Documents at Issue Were Produced in Discovery by the Government to the Defense, the Government Has Access to Them, and the Government Is Not Prejudiced by Their Use

As the Government recognizes in its Motion, Defendants are not advancing an advice of counsel defense, and the at-issue communications are not privileged. Mot. at 2. Therefore, the series of concerns the Government outlines in its Motion (i.e., that it cannot access witnesses, communications, or documents) are misplaced. No waiver of the attorney-client privilege is necessary, and the Government will not be hamstrung on cross-examination. *S.E.C. v. Lek Sec. Corp.,* 2019 WL 5703944 (S.D.N.Y. Nov. 5, 2019), does not provide otherwise. There, the SEC had been denied privileged communications during the discovery period, in part because during discovery the defendants declined to assert an advice or presence of counsel defense. *Id.* at *3. The court found, therefore, that "any probative value of such references is substantially outweighed by the danger of undue prejudice to the SEC, which was denied discovery of the confidential communications." *Id.* at *4. No such risk exists here. The documents available to the defense are the same documents available to the Government: all the documents cited by the Government that

Defendants seek to rely on were produced by the Government, which has had access to them for years.[4]

The Government's complaint that it cannot examine witnesses because they involved attorneys similarly falls flat. The documents are not privileged, so the Government is free to examine witnesses about them. Notably, the Government itself listed multiple attorneys who worked for GPB on its witness list, so presumably it believes it is capable of questioning lawyers about the issues in this case. Accordingly, this is not a situation in which Defendants seek to use these documents as a sword, on the one hand, and at the same time withhold related documents on the grounds of privilege.

Conclusion

The Motion misconstrues the purpose of the documents the Government seeks to exclude. They are not privileged and are relevant to establish [redacted]
The Government's concerns about potential prejudice it might experience are overwrought and speculative, and further belied by their years-long access to these non-privileged documents. On the contrary, the defense will be unduly prejudiced if Defendants are prohibited from presenting these documents, which are a core part of the defense and are required to rebut key allegations. For these reasons, the Court should deny the Motion.

Respectfully yours,

/s/ Sean S. Buckley
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cc: All Counsel

[4] None of the documents Defendants propose introducing are from the subset of potentially privileged documents that were produced to the defense by the Government's taint team.