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Via ECF

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

Re: *United States v. Gentile, et al.*, 21-cr-00054 (RPK)(PK)

Dear Judge Kovner:

On behalf of our client, Jeffry Schneider, we respectfully submit this letter to join in Defendant David Gentile's response to the Government's motion *in limine* seeking to preclude Defendants from relying on the presence or involvement of attorneys, which was concurrently filed this evening. ECF No. 315 (the "Motion"). We write to provide an additional basis for the Court to deny the Motion.

Mr. Gentile's opposition sets forth the principal purpose of the evidence at issue. That is not the only ground for admissibility, however, as this evidence is also admissible to demonstrate Mr. Schneider's and any alleged co-conspirators' good faith and lack of fraudulent intent. *See Jean-Laurent v. Hennessy*, 840 F. Supp. 2d 529, 536 (E.D.N.Y. 2011) (citation omitted) ("Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds.").[1]

Specifically, while Mr. Schneider does not currently anticipate arguing a generalized "presence of counsel" defense, he is entitled to demonstrate that [redacted] as evidence of good faith. [redacted], the Government has opened the door to evidence that Mr. Schneider or other alleged co-conspirators [redacted]

[1] Notably, the Government's argument is limited to the role of counsel and not compliance professionals, and thus the motion does not challenge any documents or communications involving compliance professionals. In a similar vein, the Government's Motion should not reach compliance professionals who happen to be attorneys but who are performing a compliance function, such as by reviewing marketing materials from a compliance standpoint, as their communications are not privileged or legal advice. Such communications are plainly admissible, and they do not implicate the purported concerns in the Government's letter motion.

[redacted].

The recent *Bankman-Fried* decision selectively quoted by the Government supports this conclusion. In *Bankman-Fried*, the court ruled that the involvement of counsel in charged activities was admissible as evidence of good faith because it was relevant under Rule 401 and not substantially more prejudicial than probative under Rule 403. *See United States v. Bankman-Fried*, No. S5 22-CR-0673 (LAK), 2024 WL 477043, at *2 (S.D.N.Y. Feb. 7, 2024) ("the issue before the Court was not whether the defendant adduced evidence satisfying the elements of a formal advice-of-counsel defense, but rather whether the testimony he sought to give would have satisfied Rules 401 and 403"). On the other hand, the court ruled that involvement of counsel in tangential, uncharged activities was not admissible because it was minimally probative and the jury might be confused that it related to charged activities. *Id.*

Specifically, the *Bankman-Fried* court concluded that "evidence of the presence of attorneys" in events or transactions charged against the defendant in the indictment "can be probative of a defendant's state of mind." *Id.* at *3. Thus, the court permitted evidence that "counsel was involved in drafting and implementing FTX's document retention policies" and the defendant's discussions "with counsel that some messaging applications used by FTX leaders and employees were configured automatically to delete messages after a predetermined period." *Id.* This evidence was also "unlikely to confuse the jury," because "[w]hile a jury might have surmised from this testimony that lawyers sanctioned the data retention policies, such an impression would not have prejudiced the government unfairly because the testimony did not tend to suggest that the defendant believed that other, charged conduct had been lawful." *Id.*

In contrast, the court precluded evidence about the involvement of counsel in events "only collaterally related to the charged conduct and [which] is thus minimally probative." *Id.* The court reasoned that the evidence "would have been only minimally probative because it pertained to lawyers' involvement in activities for which the defendant was not charged," and it was thus "irrelevant to whether the defendant acted with or without fraudulent intent." *Id.*

Similarly, *United States v. Runner*, No. 18-CR-0578 (JS), 2023 WL 3727532 (E.D.N.Y. May 30, 2023), supports admissibility on this basis. There, the government moved *in limine* to preclude the defense from arguing, eliciting testimony, or introducing evidence regarding: "(1) an advice of counsel defense; (2) the role attorneys played in Defendant's mail operation; and (3) Defendant's good faith concerning the legality of the operation." *Id.* at *8. The Government argued, as here, that the defense could not "satisfy the elements of the advice-of-counsel defense" and so "a limited 'good faith' defense" is inappropriate. *Id.* The court rejected the Government's attempt to categorically limit the defendants' proffered evidence:

> Although the scope of the good faith defense Defendant may advance at trial is largely unclear to the Court, Defendant's opposition indicates he may utilize such a defense premised upon 'a co-conspirator's reliance on the advice of counsel that is communicated to defendant,' . . . **The Government even acknowledges case law that indicates a limited good faith defense premised upon 'indirect legal advice, such as that provided to a third party and relayed to a defendant.'** Defendant notes that the Government's exhibits contain evidence of co-conspirators' communications with counsel, and presumes that those witnesses will testify about those exhibits on direct examination. Thus, to the extent the Government's motion can be construed as a request to prevent Defendant from cross-examining the co-conspirators as to those communications, **which are non-privileged and within the Government's possession**, any such request is DENIED.

Id. (emphasis added) (internal citations omitted). Ultimately, "[w]ithout any further insight as to Defendant's potential good faith defense," the court declined to make a pre-trial ruling regarding "the admissibility of the evidence." *Id.* The Court decided to reassess its ruling at trial as the evidence unfolded, just as the Court may do here.

These principles squarely support the admissibility of the evidence at issue here as relevant to Mr. Schneider's good faith, as well as that of certain alleged co-conspirators. Mr. Schneider has no intent to introduce irrelevant instances of counsel's involvement in order to demonstrate good faith, but rather only counsel's involvement—including in non-privileged communications—with disclosures and materials charged in the Indictment as evidence of good faith. This is permissible under the teachings of *Bankman-Fried* and *Runner*. *Accord SEC v. Ferrone*, 163 F. Supp. 3d 541, 570 (N.D. Ill. 2016).

The civil case *SEC v. Tourre*—which concerned the mere "presence and general involvement of counsel," 950 F. Supp. 2d 666, 683 (S.D.N.Y. 2013)—is distinguishable and does not hold otherwise. There, the defendant was a lower-level employee[2] who sought to argue that the existence of counsel generally should be admissible even though it was not related to the "specific disclosure language for the … transaction" at issue, and he further sought to argue that "there were many people with expertise in many areas." *Id.* The court precluded the evidence because the 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 a transaction," when mere presence does not mean that the counsel actually was involved in the specific

[2] As the court noted in *SEC v. Ferrone* in distinguishing *Tourre* and rejecting the same argument the Government asserts here, the defendant in *Tourre* "was a lower level participant in the events in question," unlike the defendant in *Ferrone* who was the C.E.O. of the company, akin to Defendants here. *Ferrone*, 163 F. Supp. 3d at 570 (concluding that "the more prudent path is to deny the SEC's Motion *in Limine*" and directing counsel to meet and confer).

transaction or disclosure at issue. *Id.* at 684. Thus, the court precluded evidence of the presence of counsel, such as "evidence relevant solely to show that lawyers attended meetings or set up meetings." *Id.*

Unlike in *Tourre*, Mr. Schneider does not currently intend to use the generalized "presence of counsel" to evince good faith, but he is entitled to argue that counsel's specific and direct involvement with certain disclosures and marketing materials at issue in the case is evidence of good faith, consistent with *Bankman-Fried*, *Runner*, and *Ferrone*.

As the court in *SEC v. Ferrone* concluded, "If the Court is going to err (and it does not think it is doing so at this point), it would prefer to err on the side of allowing the jury to decide the case rather than gutting [the defendant's] defense out of the box." 163 F. Supp. 3d at 570. The Court should do the same here and deny the Motion.

Respectfully submitted,

s/ Glenn Colton
Glenn Colton

cc: Counsel of record via ECF