IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	**Criminal No. 1:09-CR-29 (GLS)**
	)	
v.	)	
	)	
JOSEPH L. BRUNO,	)	**GOVERNMENT'S TRIAL MEMORANDUM**
	)	
	)	
	)	
Defendant.	)	

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE

Defendant Joseph L. Bruno is charged with two counts of honest services mail fraud, in violation of 18 U.S.C. §§ 1341 & 1346. The superseding indictment also seeks forfeiture.

RELEVANT LAW

A. The Statutes and Elements of the Charges Offenses

Title 18, United States Code, Sections 1341 & 1346, state, in applicable part:

> Whoever, having devised . . . any scheme or artifice to defraud . . . to deprive another of the intangible right of honest services . . . for the purpose of executing such scheme or artifice or attempting so to do . . . [causes matter to be delivered by mail] [is guilty of a crime].

To obtain a conviction, the government must prove beyond a reasonable doubt that:

1. the defendant devised a scheme or artifice to defraud;
2. for the purpose of depriving another of the intangible right of honest services;
3. the scheme involved either bribery or kickbacks;
4. the scheme involved a material misrepresentation or omission; and
5. use of the mails in furtherance of the scheme.[1]

See United States v. Rybicki, 354 F.3d 124, 145 (2d Cir. 2003) (en banc) (pre-Skilling elements); United States v. DeMizio, 741 F.3d 373, 384 (2d Cir. 2014) (post-Skilling jury "must find" that the "scheme involved either bribery or kickbacks"); United States v. Botti, 711 F.3d 299, 311 (2d Cir. 2013) ("[A]fter Skilling, a jury instruction must require the jury to find that the defendant participated in honest services mail fraud by way of a bribery or kickback scheme."); United States v. Bruno, 661 F.3d 733, 740 (2d Cir. 2011) ("In light of Skilling, this failure to limit honest services fraud to bribes and kickbacks was error.").

[1] The Government's Proposed Jury Instructions filed on April 14, 2015 provide additional statements of the law and citations to other relevant authorities.

Bribery and kickbacks involve a quid pro quo, that is, a government official's solicitation or receipt of a benefit in return for official action. Bruno, 661 F.3d at 743 (quid pro quo is "essential element of bribery theory of honest services fraud"); id. at 740 (bribery or kickback theory requires allegation of receipt of benefits in return or exchange for official action); see also United States v. Bahel, 662 F.3d 610, 635–36 (2d Cir. 2011) (jury instructed it could convict defendant of honest services fraud if it found he accepted financial benefits in return for assistance); United States v. Friedman, 854 F.2d 535, 553 (2d Cir. 1988) (under New York law, bribery is public official's solicitation or acceptance of benefit from another "upon an agreement or understanding that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced") (quoting N.Y. Penal Law § 200.10 (McKinney Supp. 1988)).

The government need not prove that the defendant promised to perform a particular act. See United States v. Seminerio, No. S108 Cr. 1238, 2010 WL 3341887, at *6 (S.D.N.Y. 2010) ("[A] jury 'need not find that the specific act to be performed was identified at the time of the promise, nor need it link each specific benefit to a single official act.'") (quoting United States v. Ganim, 510 F.3d 134, 147 (2d Cir. 2007)). The quid pro quo element is satisfied if the public official understood that as a result of the payment, he was expected to exercise particular kinds of influence on behalf of the payor as opportunities arose. See Bruno, 661 F.3d at 744 ("A promise 'to perform such acts as the opportunities arise' is sufficient."); see also United States v. Rosen, 716 F.3d 691, 700 (2d Cir. 2013) (honest services fraud statute criminalizes "'scheme[s] involving payments at regular intervals in exchange for specific official[] acts as the opportunities to commit those acts arise,' even if 'the opportunity to undertake the requested act has not arisen,' . . . and even if the payment is not exchanged for a particular act but given with

the expectation that the official will 'exercise particular kinds of influence'"). Once the quid pro quo has been established, the specific transactions comprising the illegal scheme need not match up "this" for "that." Rosen, 716 F.3d at 700.

EVIDENTIARY ISSUES

A. Statements by the Defendant, Authorized Persons, Agents, Partners, and Co-Conspirators Are Admissible Pursuant to Fed. R. Evid. 801(d)(2).

The government will offer statements that were made by (a) the defendant, (b) persons authorized by him to make statements, (c) his agents, and (c) persons engaged in partnerships or lawful joint ventures with him. All of these statements are admissible because they are not hearsay.

1. Whether a Statement Qualifies As a Statement Under Rule 801(d)(2)(C), (D), or (E) is a Preliminary Question for the Court.

Whether a statement qualifies under Rule 801(d)(2)(C) as a statement authorized by a party, or under Rule 801(d)(2)(D) as a statement made by a party's agent, or under Rule 801(d)(2)(E) as a statement made by a co-conspirator during and in furtherance of a conspiracy, is a preliminary question to be decided by the Court by a preponderance of the evidence. See Bourjaily v. United States, 483 U.S. 171, 175–76 (1987) ("[T]he existence of a conspiracy and petitioner's involvement in it are preliminary questions of fact that, under Rule 104, must be resolved by the court."); Fed. R. Evid. 801(d)(2), Advisory Committee Notes, 1997 Amendment (noting that 1997 amendment applied Bourjaily ruling regarding subdivision (E) to subdivisions (C) and (D)).

In making this factual determination, the Court should consider both the hearsay statement itself and independent corroborating evidence. See United States v. Farhane, 634 F.3d 127, 161 (2d Cir. 2011) (citing United States v. Tellier, 83 F.3d 578, 580 (2d Cir. 1996) with the

parenthetical: "hearsay statements may themselves be considered in determining admissibility under Rule 801(d)(2)(E), provided there is some independent corroboration of defendant's participation in conspiracy"); Fed. R. Evid. 801(d)(2), last sentence ("The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).").

2. The Defendant's Statements are Admissible under Fed. R. Evid. 801(d)(2)(A).

The government will ask witnesses to testify about statements made by the defendant to them, or in their presence as well as statements he made in writing such as notes on documents. Statements made by the defendant are admissible "because a 'party's own statement,' offered against that party, is defined as 'not hearsay.' Fed. R. Evid. 801(d)(2)(A)." United States v. Aspinall, 389 F.3d 332, 341 (2d Cir. 2004); see also United States v. Shulman, 624 F.2d 384, 390 (2d Cir. 1980) ("Appellant concedes, as he must, that his own statements were admissible as non-hearsay admissions regardless of whether such statements were against his interest when made.").

Applying this rule, the defendant's statements to Jared Abbruzzese and others are admissible. For example, the government will elicit testimony that the defendant (a) solicited Abbruzzese to hire him as a consultant, (b) told Abbruzzese that the Assembly Speaker was paid $40,000 a month by the Trial Lawyer's Association,[2] and (c) offered Abbruzzese a 1/3 interest in some horses.

[2] Both this statement and evidence demonstrating that it was false are admissible to show the defendant's efforts to bolster his credibility with Abbruzzese and his efforts to further the fraud, as well as his purpose in committing the fraud. See United States v. Cusack, 229 F.3d 344, 348 (2d Cir. 2000) (district court properly admitted evidence that defendant "lied about his military background in order to bolster his own credibility and to further the fraud;" that evidence was

3. Statements of Persons Authorized to Speak For the Defendant Are Admissible Under Fed. R. Evid. 801(d)(2)(C).

The government will elicit testimony that the defendant authorized a person, whom he appointed to the NYRA oversight board, to speak on his behalf to the then NYRA President. Because the defendant authorized the person to speak, the then NYRA President's testimony about those statements is admissible pursuant to Fed. R. Evid. 801(d)(2)(C). See United States v. Belfast, 611 F.3d 783, 820 (11th Cir. 2010) (testimony of soldier-witness that former commander of unit told him that defendant was the head of that unit properly admitted under Fed. R. Evid. 801(d)(2)(C) because the statements "concerned the same matter for which [defendant] was employing [the soldier-witness,] namely, to recommend men for the [unit] . . . [defendant] hired [former commander] to find him soldiers to form the [unit,]" and former commander asked soldier-witness to join the unit on defendant's behalf).

4. Statements of the Defendant's Agents are Admissible Under Fed. R. Evid. 801(d)(2)(D).

The government will prove that various witnesses, including New York State employees, were agents of the defendant who made statements within the scope of that relationship. Such statements, including, for example, invoices, notes and other documents prepared by the defendant's assistant, are therefore admissible pursuant to Fed. R. Evid. 801(d)(2)(D). See Davis v. Mobil Oil Exploration & Producing Southeast, Inc., 864 F.2d 1171, 1173–74 (5th Cir.1989) (statement made by unidentified Mobil "company man" at meeting properly admitted under Rule

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also probative of defendant's "purpose in committing the fraud"); id. ("[I]t is a general principle of law that whenever a fraudulent intention is to be established, collateral facts tending to show such intention are admissible proof.") (quoting United States v. Lamont, 565 F.2d 212, 215 (2d Cir. 1977)). The statement is also admissible to show consciousness of guilt. United States v. Meyer, 733 F.2d 362, 363 (5th Cir. 1984). The government need not show that the defendant knew the statement to be false for it to be admissible; it is for the jury to determine whether it was false and how much weight to give to it. Id. at 363 n.1.

801(d)(2)(D) because "enough evidence was presented to support a conclusion by the district court that a certain unidentified person was in fact the agent of Mobil[;]" evidence included that three Mobil "company men" were present at meeting, "the older of the three" made statement and was wearing Mobil hard hat; two others testified that individual who made statement was a Mobil "company man").

5. Statements in Furtherance of Lawful Joint Ventures and Partnerships are Admissible Under Fed. R. Evid. 801(d)(2)(E).

The government will prove that the defendant entered into several agreements including, among others, the following: (a) an oral agreement regarding ownership of horses with Abbruzzese and another, (b) written consulting agreements with CTA and C&TA, and (c) through his consulting company, written consulting agreements with Motient and TerreStar. As a result of these agreements, oral statements made and documents prepared by those individuals or entities, or persons acting on their behalf, are admissible pursuant to Fed. R. Evid. 801(d)(2)(E) as co-conspirator statements.

Although the co-conspirator exception is most often relied on in the context of criminal conspiracies, "the objective of the joint venture that justifies deeming the speaker as the agent of the defendant need not be criminal at all." United States v. Russo, 302 F.3d 37, 45 (2d Cir. 2002); see United States v. Nelson, 732 F.3d 504, 515–16 (5th Cir. 2013) ("A conspiracy for the purpose of the hearsay exclusion need not be unlawful; the statement may be made in furtherance of a 'lawful joint undertaking.'"); United States v. Brockenborrugh, 575 F.3d 726, 735 (D.C. Cir. 2009) ("[D]espite its use of the word 'conspiracy,' Rule 801(d)(2)(E) allows for admission of statements by individuals acting in furtherance of a lawful joint enterprise.").

The co-conspirator exception applies to partnerships.[3] See United States v. Gewin, 471 F.3d 197, 201 (D.C. Cir. 2006) (noting that Rule 801(d)(2)(E) is "based on concepts of agency and partnership law"); United States v. Stone, No. 10-20123, 2011 WL 17613, at *5 (E.D. Mich. Jan. 4, 2011) ("To find that Defendant was a member of a conspiracy for purposes of Rule 801(d)(2)(E), the Court only needs to find that Defendant was a member of a joint venture or partnership, with a specific and established objective.").

Applying Rule 801(d)(2)(E), courts have admitted statements when made in furtherance of (a) a "common scheme" among mayors "to recruit [a company's] business to their towns[,]" Nelson, 732 F.3d at 516; see id. (affirming district court's decision to admit recorded statements of member of a lawful joint venture about defendant's "inclinations towards corrupt activity"); (b) "a business relationship" which involved a "lawful joint enterprise to acquire" certain property, Brockenborrugh, 575 F.3d at 735–36; (c) a "common enterprise of stock promotion," Gewin, 471 F.3d at 200, 201–02; and (d) a voyage of a vessel, United States v. Postal, 589 F.2d 862, 886 n.41 (5th Cir. 1979) (logbook of voyage admissible co-conspirator statement because "voyage was a 'joint venture' in and of itself apart from the illegality of its purpose").

Even if the hearsay declarant is not identified, the statements may still be admitted so long as "the facts and circumstances surrounding the making of the statement indicate that the speaker is a member of the conspiracy or joint venture." United States v. El Mezain, 664 F.3d 467, 505 (5th Cir. 2011); see also 4 Mueller & Kirkpatrick, Fed. Evid. § 8:59 (3d ed.) ("[A]n inability to attribute the statement to any particular person does not necessarily get in the way of

[3] Statements made in furtherance of a partnership are also admissible through Rule 801(d)(2)(D). See United States v. Saks, 964 F.2d 1514, 1524 (5th Cir. 1992) ("[T]he general rule at common law was that the declarations of one partner made during the existence of the partnership and in relation to its affairs are admissible against the other partners even if the declarant is not a party to the action. [citation omitted]. We have no reason to believe that Congress departed from this rule when it enacted the Federal Rules of Evidence in 1975.") .

admissibility under Rule 801(d)(2)(E) because [c]ircumstantial proof that the person making the statement was involved in the conspiracy can suffice to support use of the exception."). Moreover, "[i]t is axiomatic that all acts and statements committed by one co-conspirator in furtherance of the conspiracy are admissible against all members of the conspiracy." United States v. Geibel, 369 F.3d 682, 695 (2d Cir. 2004).

B. Evidence that the Defendant Attempted to Cover Up His Relationship with Abbruzzese is Admissible.

The government will introduce evidence that Bruno "attempted to cover up the extent of his relationship with Abbruzzese." Bruno, 661 F.3d at 744. First, the CTA and C&TA payments were made to the defendant's consulting company when the "consulting" agreements were with the defendant in his personal capacity. Id. at 744. The defendant's use of Capital Business Consultants is relevant to the defendant's intent and also evidence of a cover up. See United States v. McDonough, 56 F.3d 381, 391 (2d Cir. 1995) (evidence that defendant organized separate agency to receive payments relevant to intent; "[a]s the district court observed at sentencing, 'the very creation of the Collar City Agency sp[eaks] . . . volumes about the fact that it was a coverup and an attempt to hide what . . . [defendant] believed[ ] to be an illegal venture").

Second, the defendant was not truthful when a Senate lawyer asked him whether Abbruzzese had any business before New York State. Bruno, 661 F.3d at 744 ("[W]hen asked by [Senate lawyer] whether Abbruzzese had any business before New York State, [the defendant] replied that he was not aware of any even though the defendant knew Abbruzzese was seeking funding on behalf of Evident.").

Third, the defendant failed to disclose the horse transaction on his annual statement of financial disclosure. Id. In fact, the defendant's 2004 and 2005 annual statements of financial

disclosure are relevant on the issues of intent and attempts to conceal the relationship because they reveal that he did not explicitly disclose the payments from CTA and C&TA, the horse partnership, or the $40,000 debt Abbruzzese owed at the end of 2005. See United States v. Ciavarella, 716 F.3d 705, 729–30 (3d Cir. 2013), cert. denied, 134 S.Ct. 1491 (2014) (failure to disclose receipt of payments on annual statement of financial disclosure supported honest services fraud conviction); United States v. Rosen, 716 F.3d 691, 702 (2d Cir. 2013) (failure to disclose consulting agreements "evidenced either (1) a deliberate attempt to conceal a corrupt relationship with [legislator], or (2) consciousness of guilt").

C. Impeachment Questions Are Limited by Fed. R. Evid. 608(b).

In the event that the defendant seeks to impeach a government witness's character for truthfulness, he must comply with Fed. R. Evid. 608(b), which provides:

> Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of [the witness].

Under Rule 608(b), the cross-examiner may not ask if the witness was arrested, disciplined, suspended, or fired, but must phrase the question in terms of the underlying event itself. See Young v. James Green Management, Inc., 327 F.3d 616, 626 n.7 (7th Cir. 2003) ("As a general proposition, '[c]ross examination as to a specific instance relating to the character for untruthfulness of the particular witness being examined . . . should be phrased in terms of the underlying event itself. Thus where the specific act is probative of untruthfulness of the witness being cross-examined, the question should not inquire about rumors, reports, arrests or indictments but rather about the underlying specific event of misconduct itself.'") (quoting Graham, Handbook of Federal Evidence § 608.4 (5th ed. 2001)); United States v. Davis, 183 F.3d 231, 257 n.12 (3d Cir. 1999) (where witness had been suspended for certain conduct, cross-

examination could not refer to suspension, but must be limited "to the facts *underlying* those events") (emphasis in original).

More specifically, "[i]t is improper to inquire whether the witness was 'fired,' 'disciplined,' or 'demoted' for the alleged act—those terms smuggle into the record implied hearsay statements by third parties who may lack personal knowledge." 1 McCormick on Evidence § 41 (7th ed. 2013) (citing Young, 327 F.3d at 626 n.7). If a witness denies conduct, the examiner must "take [the] answer." See United States v. Bocra, 623 F.2d 281, 288 (3d Cir. 1980) (under Rule 608(b), "[i]f [IRS agent] denied soliciting other taxpayer bribes, [defendant] would have to 'take his answer' and would not be able to introduce rebuttal testimony.") (citations omitted). This means that even if the witness denies the conduct, "counsel should not be permitted to circumvent the no-extrinsic-evidence provision [in Rule 608(b)(1)] by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act." Davis, 183 F.3d at 257 n. 12 (quoting Saltzburg, Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence, 7 Crim. Just. 28, 31 (Winter 1993)).

D. Grand Jury and Testimony From the 2008 Trial Is Admissible as Substantive Evidence to Impeach Any Witness Who Testifies Inconsistently and to Rehabilitate Any Witness Who is Impeached.

Under certain circumstances, a witness's grand jury and prior trial may be admissible as substantive evidence. Fed. R. Evid 801(d)(1) provides that a statement is not hearsay if:

> The declarant testifies [at the trial or hearing] and is subject to cross-examination [concerning the statements,] and the statement: (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying . . . .

Both grand jury and 2008 trial transcripts can be admitted as substantive evidence if a witness testifies inconsistently during this trial. See United States v. Truman, 688 F.3d 129, 142

(2d Cir. 2012) ("[W]here, as here, a witness who testifies under oath and is subject to cross-examination in a prior . . . court proceeding explicitly refuses to answer the same questions at trial, the refusal to answer is inconsistent with his prior testimony and the prior testimony is admissible under Rule 801(d)(1)(A)") (citations omitted); United States v. Marchand, 564 F.2d 983, 999 (2d Cir. 1977) (Friendly, J.) ("[I]f a witness has testified to [certain] facts before a grand jury and forgets or denies them at trial, his grand jury testimony or any fair representation of it falls squarely within Rule 801(d)(1)(A)."); accord United States v. Milton, 8 F.3d 39, 46-47 (D.C. Cir. 1993) (quoting Judge Friendly and rejecting defendant's argument that witness's lack of memory regarding her grand jury testimony kept her trial testimony from satisfying Fed. R. Evid. 801(d)(1)(A) and the Confrontation Clause). For purposes of this rule, the word "inconsistent" is not limited to "statements diametrically opposed or logically incompatible." United States v. Williams, 737 F.2d 594, 608 (7th Cir. 1984). Inconsistency "may be found in evasive answers, . . . silence, or changes in positions," "a purported change in memory," and, "[p]articularly in a case of manifest reluctance to testify." Id. (internal quotations omitted).

Grand jury testimony and prior trial testimony may also be admitted as substantive evidence when a witness has been impeached and the prior testimony qualifies as a prior consistent statement made before the motive to fabricate arose. United States v. James, 609 F.2d 36, 49-50 (2d Cir. 1979). Even if not admissible under Rule 801(d)(1)(B), a prior consistent statement may be admissible for rehabilitation. United States v. Brennan, 798 F.2d 581, 587-89 (2d Cir. 1986).

These principles were not affected by Crawford v. Washington, 541 U.S. 36 (2004). United States v. Melenedez, No. 04 CR. 473, 2006 WL 1379624, at *6 (S.D.N.Y. May 15, 2006).

E. Witnesses May Not Offer Unsolicited Testimony About Their Prior Statements.

In the event a witness attempts to testify about that witness's prior statements (1) before the grand jury, (2) during the prior trial of this matter, (3) to government agents, or (4) to counsel, the witness generally should not be permitted to do so, pursuant to Rules 402, 611(a), and 802. With certain limited exceptions (e.g., prior inconsistent statements given under penalty of perjury), such testimony is unresponsive, irrelevant, inadmissible hearsay. See Fed. R. Evid. 801(c)(1) and (d).

F. Evidence of Prior "Good Acts" is Not Admissible.

Pursuant to Fed. R. Evid. 405, the defendant may offer character evidence only in one of two forms: "testimony as to reputation" or "testimony in the form of an opinion." Character is not an essential element of honest services fraud, and the defendant may therefore not admit evidence of specific instances of conduct. Fed. R. Evid. 405(b); cf. United States v. Benedetto, 571 F.2d 1246, 1249-50 (2d Cir. 1978) (noting that, by offering evidence that defendant had not taken bribes on other occasions, "the defense improperly attempted to establish defendant's good character by reference to specific good acts"); United States v. Doyle, 130 F.3d 523, 542 (2d Cir. 1997) ("[I]f specific good deeds could be introduced to disprove knowledge or intention, which are elements of most crimes, the exception of Rule 405(b) would swallow the general rule of 405(a) that proof of specific acts is not allowed."); United States v. Scarpa, 913 F.2d 993, 1010-11 (2d Cir. 1990) (observing that "good acts" evidence "would only be relevant if the indictment charged [defendants] with ceaseless criminal conduct").

Under Fed. R. Evid. 404(a), where proffered character evidence has "no bearing on [a pertinent character trait] and . . . could well cause the jury to be influenced by sympathies [that have] no bearing on the merits of the case," the evidence should be excluded. United States v. Paccione, 949 F.2d 1183, 1201 (2d Cir. 1991) (upholding district court's refusal in fraud case to

allow defendant to introduce evidence that he cared for his son with cerebral palsy and therefore would not commit fraud because a fraud conviction would cause him to leave his son).

G. Summary Charts are Admissible Under Fed. R. Evid. 1006.

The government will introduce charts, summaries, and calculations based on the evidence pursuant to Fed. R. Evid. 1006. That rule allows the use of a "summary, chart, or calculation to prove the content of voluminous writings . . . that cannot be conveniently examined in court." Fed. R. Evid. 1006. See, e.g., United States v. Yousef, 327 F.3d 156, 157-58 (2d Cir. 2003) (upholding use of summary charts "because the Government was . . . entirely within its rights to use charts to draw the jurors' attention to particular evidence culled from a voluminous set of records").

"[C]harts may be introduced either through a person who prepared the chart or a person who has reviewed the underlying documents and confirmed the accuracy of the chart." United States v. Bertoli, 854 F. Supp. 975, 1055 (D.N.J. 1994), aff'd in part and vacated and remanded for resentencing, 40 F.3d 1384 (3d Cir. 1994), aff'd 74 F.3d 1228 (3d Cir. 1995). Here, the government will introduce summary charts through witnesses familiar with the underlying documents and how the charts were prepared. See id. at 1055.

As required by the rule, the United States has provided the defendants with copies of the documents supporting these charts and those copies will be available during trial. In addition, the government will provide the defendant with copies of the charts and summaries promptly.

TRIAL ISSUES

A. The Government May Impeach Its Witnesses.

The government plans to call witnesses who participated in conversations and/or transactions involving the defendant which are necessary to construct the government's case. The government certainly does not vouch for the credibility of any witness. See United States v.

Thai, 29 F.3d 785, 807 (2d Cir. 1994) ("A prosecutor may not properly vouch for the credibility of a witness."). The government may argue to the jury that portions of the testimony of certain witnesses should not be credited, and it may also impeach certain aspects of the testimony of some witnesses. As the Second Circuit explained in United States v. Eisen, 974 F.2d 246 (2d Cir. 1992):

> Where the Government has called a witness whose corroborating testimony is instrumental to constructing the Government's case, the Government has the right to question the witness, and to attempt to impeach him about those aspects of his testimony that conflict with the Government's account of the same events. [Citation omitted]. Here, the testimony of the hostile witnesses provided affirmative proof that was necessary to construct the Government's case, and thus the Government was entitled to question these witnesses and to invite the jury to disbelieve that portion of their accounts that contradicted the prosecution's theory of the case.

974 F.2d at 262-63. Indeed, "impeachment of hostile Government witnesses is admissible as negative inference evidence." Id. at 262 (citing Marchand, 564 F.2d at 985-86). However, "impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible." United States v. Zackson, 12 F.3d 1178, 1184 (2d Cir. 1993) (citations omitted).

B. On Direct Examination, the Government May Elicit Evidence of Orders of Statutory Immunity.

The government will call several witnesses who have indicated that they will assert their right under the Fifth Amendment not to incriminate themselves, and the government plans to apply to this Court for orders granting statutory immunity to these witnesses. Courts recognize a general principle allowing the government to bring out on direct examination "matters damaging to the witness's credibility." United States v. Singh, 628 F.2d 758, 761 (2d Cir. 1980). "Admission of this evidence is permitted in order to avoid an inference by the jury that the Government is attempting to keep from the jury the witness's possible bias." Id.

Based on this principle, during the direct examination of any witness who is testifying pursuant to a grant of statutory immunity, the government may elicit the existence of the immunity and compulsion order, and the witness's understanding of it. United States v. Bruno, 09-CR-29, Trial Transcript at 374–76; United States v. McNeil, 728 F.2d 5, 14 (1st Cir. 1984). Whether the defense attacks the credibility of a witness who is testifying under such an order "does not diminish the benefit to the jury of having before it information relevant to its task of judging credibility and weighing testimony. The fact of immunity and compulsion orders aids the jury function regardless of whether defendant intended to attack the credibility of the witnesses." McNeil, 728 F.2d at 14 (citation omitted). The Court should give the same limiting instruction that it gave during the 2008 trial. See Government's Proposed Jury Instruction No. 24; Bruno, Trial Transcript at 423 ("What Miss Coombe has just indicated is I have signed an order which provides this witness with immunity, this witness having previously exercised her Fifth Amendment rights. Immunity is a promise that any testimony or other information the witness provided would not be used in this case against her in a criminal case. You should consider this evidence for the limited purpose of judging this witness' credibility and weighing her testimony and for – not for any other purpose whatsoever. You cannot assume that because this witness has previously exercised her Fifth Amendment privilege that she is guilty of any offense, nor may you consider her invocation of her Fifth Amendment privilege as any evidence of Mr. Bruno's guilt. So I am allowing you to understand the circumstances pursuant to which this witness is testifying, you are to take that into consideration as you evaluate the testimony she is about to give and for no other reason.").

Dated: April 17, 2014

Respectfully submitted,

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