IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal No. 08-CR-231 (EGS)
	)	
THEODORE F. STEVENS,	)	
	)	
Defendant.	)	
	)	
_____	)	

UNITED STATES' MOTION *IN LIMINE* FOR ADMISSION OF CERTAIN STATEMENTS FROM E-MAIL AND OTHER CORRESPONDENCE

The United States of America, by and through its undersigned counsel, hereby moves *in limine* for the admission of certain statements of defendant in the form of e-mails and other correspondence and also moves for the admission of ceratin statements by Bob Persons and Bill Allen to defendant. First, defendant's statements are the admissions of a party opponent and admissible as nonhearsay under Federal Rule of Evidence 801(d)(2)(A). Second, certain statements of Persons and Allen made to defendant are admissible as non-hearsay to establish defendant's state of mind. Third, certain statements of Persons, Allen, and/or Bob Penney made as part of any common scheme or enterprise in which defendant was a participant are admissible under Rule 801(d)(2)(E). Fourth, specific statements of others made in e-mail to defendant are admissible as adoptive admissions of defendant under Rule 801(d)(2)(B).

I. All Relevant Statements by Defendant are Admissible Nonhearsay Statements.

As an initial matter, there can be no dispute that all relevant statements of defendant offered by the government against defendant are admissible nonhearsay admissions of a party opponent offered against the party pursuant to Rule 801(d)(2)(A). The Rule is clear that a statement is not

hearsay if it is "offered against a party and [the statement] is (A) the party's own statement, in either an individual or a representative capacity."[1] Id. Accordingly, any e-mail or note authored by defendant plainly constitute his own statements and are admissible nonhearsay statements. Rule 801(d)(2)(A) (a party's own statement, when the statement is offered against the party, is not hearsay); United States v. Brown, 459 F.3d 509, 528 & n.17 (5th Cir. 2006); United States v. Safavian, 435 F. Supp. 2d 36, 43 (D.D.C. 2006). The Court should therefore allow the admission of e-mails and notes sent to others by defendant.[2]

Importantly there is no issue with the authenticity of the statements identified in this motion. Each of the statements at issue were produced by defendant to the government and defendant has agreed to the authenticity of all e-mail and other documents he produced to the government. The instant motion is necessary because defendant has not agreed to the admissibility of these materials.

II. Statements of Others Made to Defendant are Admissible to Show Defendant's State of Mind.

The statements of others made to defendant are admissible to show defendant's state of mind. "An out-of-court statement that is offered to show its effect on the hearer's state of mind is not hearsay under Rule 801(c)." United States v. Thompson, 279 F.3d 1043, 1047 (D.C. Cir. 2002); see also United States v. Williams, 358 F.3d 956, 963 (D.C. Cir. 2004); United States v. Sesay, 313 F.3d 591, 599 (D.C. Cir. 2002); Rule 801(c) (Defining hearsay as a "statement other than one made

[1] Rule 801(d)(2)(A) does not allow defendant to introduce his own statements as nonhearsay as such statements are not offered "against a party."

[2] This would include such e-mails as Exhibit 464 (3/14/01 e-mail from defendant to Ben Stevens noting that "Rocky (who works for Bill A) have [sic] keys") and Exhibit 620 (11/30/00 e-mail from defendant to family members noting that Bob Persons is the manager of improvements at the chalet).

by declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

Accordingly, each of the statements at issue in this motion made to defendant during the course of e-mail communications with Bob Persons, Bill Allen, and others with regard to the specific topic areas identified below (*i.e.*, e-mail concerning the renovation and repair of the chalet) are each admissible to demonstrate defendant's state of mind regarding those topic areas. By way of example, statements made to defendant by Bob Persons detailing work done by specific employees of Bill Allen demonstrate whether defendant had notice that Allen's employees were working at the site, not whether it was true that specific employees did certain work. Each of the statements of others detailed below are admissible for such a purpose – was defendant on notice that he was receiving benefits from Allen, Persons, Penney and others, not whether the specific statements themselves were true.

III. Statements by Bob Persons and/or Bill Allen to Defendant are Co-Conspirator Statements Admissible Under Rule 803(d)(2)(E).

The statements of Robert Persons and Bill Allen identified below were made when defendant, Persons, and Allen were acting in concert toward common goals and were made in furtherance of those common goals. As such, the statements of Persons and Allen are admissible as nonhearsay co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). United States v. Gewin makes clear that "'when two or more individuals are acting in concert toward a common goal, the out-of-court statements of one are . . . admissible against the others, if made in furtherance of the common goal'" under Rule 801(d)(2)(E). 471 F.3d 197, 201 (D.C. Cir. 2006) (quoting United States v. Weisz, 718 F.2d 413, 433 (D.C. Cir. 1983)). The court in Gewin noted that Rule 801(d)(2)(E) is "based on concepts agency and partnership law and [is] applicable in both civil and

criminal trials" and that "the doctrine is not limited to unlawful combinations." See also; Weisz, 718 F.2d at 433. The court further held that "the rule was 'meant to carry forward the universally accepted doctrine that a joint venturer is considered a coconspirator for the purpose of this [R]ule even though no conspiracy has been charged.'" Id. (quoting Weisz 718 F.2d at 433). The joint enterprise need not be illegal, rather out-of-court statements made in furtherance of a lawful joint enterprise may be admitted as nonhearsay. Gewin, 471 F.3d at 202.

Statements by an alleged coconspirator or joint venturer may be received in evidence against a defendant on trial if there is "evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'during the course and in furtherance of the conspiracy.'" United States v. Bourjaily, 483 U.S. 171, 175 (1987). The government must establish these predicates by a preponderance of the evidence. Id. at 176 ("[W]hen the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the court must apply the preponderance of evidence standard in resolving these questions.")

The fact that no conspiracy has been alleged in the indictment is immaterial. In fact, "the use of the term 'conspiracy' does not limit the doctrine to unlawful combinations." Gewin, 471 F.3d at 202. Accordingly, "[t]he government need not charge the defendant with conspiracy in order to admit hearsay statements into evidence under the coconspirator exception." United States v. Beckham, 968 F.2d 47, 51 n.2 (D.C. Cir. 1992); accord, e.g., United States v. Ellis, 156 F.3d 493, 497 (3d Cir. 1998) ("The law is well settled that out-of-court statements may be admissible under Rule 801(d)(2)(E) even if the defendant is not formally charged with any conspiracy in the indictment."); United States v. Russo, 302 F.3d 37, 45 (2d Cir. 2002).

In deciding whether proffered statements qualify as a coconspirator's statements, the Court may consider the proffered statements themselves. "We think that there is little doubt that a

co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy . . . . [A] court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted." Bourjaily, 483 U.S. at 175; see also Fed. R. Evid. 801(d)(2)(E) (The contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered . . . .").

Accordingly, e-mails from Persons and/or Allen sent to or copying defendant when defendant, Persons and/or Allen were acting in concert toward a common goal are admissible as statements of defendant's coconspirators during the course and in furtherance of a conspiracy. Fed. R. Evid. 801(d)(2)(E). As the government will prove the existence of the particular common goals identified below by a preponderance of admissible evidence, and the e-mails and other correspondence to and copying defendant were made during the course and in furtherance of a common goal, the e-mails and other correspondence are not hearsay under Rule 801(d)(2)(E) and the Court should admit them.

A. Statements Concerning the Renovation and Maintenance of the Chalet Between Defendant, Robert Persons and/or Bill Allen.

The specific statements listed below from Robert Persons and/or Bill Allen made to defendant concern the renovation, improvement, and maintenance of defendant's chalet. The statements make clear that defendant, Persons, and Allen were all working toward a common goal, *i.e.* the improvement and maintenance of defendant's chalet. As discussed above, whether that common goal in and of itself was inherently legal or illegal is of no matter. Rather, the e-mail and other communications demonstrate a flow of information to defendant about the status of the

renovation of the chalet and maintenance of the chalet, as well as responses to periodic inquires from defendant about the chalet and messages of appreciation from defendant. These communications between defendant, Persons, and/or Allen are identified by exhibit number in chronological order below (the government will provide the Court and defendant a courtesy copy of the specific exhibits in order):

- Exhibit 1031: 7/20/00 E-mail from Persons to defendant[3];
- Exhibit 425: 8/7/00 E-mail from Persons to defendant;
- Exhibit 428: 8/21/00 Note from defendant to Allen.
- Exhibit 694: 8/23/00 E-mail from Persons to defendant to Persons;
- Exhibit 1033: 8/23/00 E-mail from Persons to defendant;
- Exhibit 430: 9/08/00 E-mail from defendant to Persons;
- Exhibit 1017: 9/10/00 E-mail from Persons to defendant;
- Exhibit 1038: 9/12/00 E-mail from Persons to defendant to Persons;
- Exhibit 1018: 9/14/00 E-mail from Persons to defendant to Catherine Stevens;
- Exhibit 1019: 9/17/00 E-mail from Persons to defendant to Persons;
- Exhibit 1040: 9/18/00 E-mail from Persons to defendant to Persons;
- Exhibit 1041: 9/20/00 E-mail from Persons to defendant to Persons;
- Exhibit 1020: 9/20/00 E-mail from Persons to defendant to Catherine Stevens;
- Exhibit 1022: 9/21/00 E-mail from Persons to defendant to Persons;

[3] The e-mail traffic referenced herein is described in order of communication, *i.e.*, in this instance "E-mail from Persons to defendant" reflects that Persons sent an e-mail communication to defendant. "E-mail from Persons to defendant to Persons" would reflect an e-mail communication from Persons to defendant and then from defendant back to Persons.

- Exhibit 1024: 9/21/00 E-mail from Persons to defendant to Persons and Catherine Stevens;
- Exhibit 432: 9/24/00 E-mail from defendant to Allen;
- Exhibit 1035: 10/2/00 E-mail from Persons to defendant to Catherine Stevens;
- Exhibit 1036: 10/09/00 E-mail from Persons to defendant to Catherine Stevens;
- Exhibit 1023: 10/13/00 E-mail from Persons to defendant to Catherine Stevens;
- Exhibit 439: 11/08/00 E-mail from defendant to Allen;
- Exhibit 444: 1/17/01 E-mail from Persons to defendant;
- Exhibit 1034: 1/13/01 E-mail from Persons to defendant;
- Exhibit 449: 2/06/01 E-mail from Persons to defendant;
- Exhibit 452: 2/07/01 E-mail from Persons to defendant;
- Exhibit 456: 2/07/01 E-mail from defendant to Persons;
- Exhibit 677: 4/07/01 E-mail from defendant to Persons and Bill Allen;
- Exhibit 699: 4/18/01 Note from defendant to Allen;
- Exhibit 678: 5/14/01 E-mail from defendant to Allen and others;
- Exhibit 468: 5/22/01 Note from defendant to Allen;
- Exhibit 604: 5/22/01 Note from defendant to Persons;
- Exhibit 488: 9/17/02 E-mail from Persons to defendant;
- Exhibit 489: 9/18/02 E-mail from Persons to defendant;
- Exhibit 1021: 9/20/02 E-mail from Persons to defendant to Persons;
- Exhibit 491: 9/24/02 E-mail from Persons to defendant;
- Exhibit 492: 9/29/02 Note from defendant to Allen;
- Exhibit 494: 10/02/02 E-mail from Persons to defendant;

- Exhibit 495: 10/06/02 E-mail from defendant to Allen;
- Exhibit 497: 10/07/02 E-mail from Persons to defendant;
- Exhibit 504: 10/10/02 E-mail from Persons to defendant;
- Exhibit 506: 10/13/02 E-mail from Persons to defendant;
- Exhibit 507: 10/17/02 E-mail from Persons to defendant;
- Exhibit 509: 11/08/02 E-mail from defendant to Allen;
- Exhibit 515: 12/11/02 E-mail from Persons to defendant;
- Exhibit 518: 12/12/02 E-mail from defendant to Persons;
- Exhibit 519: 12/15/02 E-mail from Persons to defendant;
- Exhibit 521: 12/15/02 E-mail from defendant to Persons;
- Exhibit 1026: 12/15/03 E-mail from Persons to defendant;
- Exhibit 1027: 12/17/03 E-mail from Persons to defendant.

B. Statements Between Bob Persons and Defendant Concerning Persons' Gift of a Massage Chair to Defendant.

The specific statements listed below of Robert Persons made to defendant concern Persons' gift of a massage chair to defendant. The statements make clear that Persons and defendant were working toward a common goal, the acquisition of a massage chair by Persons from the Brookstone company for delivery to defendant. Again, as discussed above, whether that common goal in and of itself was inherently legal or illegal is of no matter. The e-mail communications listed below consist of a flow of information to defendant about the status chair and messages of appreciation from defendant. These communications between defendant and Persons regarding are identified in order below (the government will provide a courtesy copy to the Court and counsel):

- Exhibit 445: 2/02/01 E-mail from Persons to defendant;

- Exhibit 446: 2/05/01 E-mail from defendant to Persons;
- Exhibit 447: 2/06/01 E-mail from Persons to defendant;
- Exhibit 448: 2/06/01 E-mail from Persons to defendant;
- Exhibit 449: 2/06/01 E-mail from Persons to defendant;
- Exhibit 450: 2/06/01 E-mail from defendant to Persons;
- Exhibit 451: 2/07/01 E-mail from Persons to defendant;
- Exhibit 452: 2/07/01 E-mail from Persons to defendant;
- Exhibit 454: 2/07/01 E-mail from defendant to Persons;
- Exhibit 456: 2/07/01 E-mail from defendant to Persons;
- Exhibit 462: 3/12/01 E-mail from defendant to Persons.

C. Statements Between Bob Persons and Defendant Concerning a Gift of a Custom Stained Glass Window.

The specific statements listed below of Bob Persons made to defendant concern Bob Penney's gift of a custom stained glass window to defendant. The statements make clear that Persons, Penney and defendant were working toward a common goal, the gift of a custom stained glass window to defendant from Penney. Again, as discussed above, whether that common goal in and of itself was inherently legal or illegal is of no matter. The e-mail communications listed below consist of a flow of information to defendant about the status of the stained glass window. The communications between defendant and Persons are identified in order below (the government will provide a courtesy copy to the Court and counsel):

- Exhibit 452: 2/07/01 E-mail from Persons to defendant;
- Exhibit 454: 2/07/01 E-mail from defendant to Persons;

D. Statements from Defendant Directed to Bob Penney Concerning the Gift of a Dog.

The specific statements listed below concern Penney's gift of a dog to defendant. The statements make clear that Penney and defendant were working toward a common goal, a plan to hide Penney's gift of a dog to defendant from the press because defendant knew the value of the gift was in excess of the gift limits imposed by the Senate. The e-mail communications listed below detail the plan to hide the receipt of the dog from Penney and instead create an impression that the dog was given to defendant by the Kenai Classic charity. The e-mail traffic also demonstrates a concern by defendant about how the charity recorded the purchase of the dog. These statements are all admissible as the defendant's own statements under Rule 801(d)(2)(E). The government notes the existence of this joint venture between defendant and Penney, however, to demonstrate why questions to witnesses concerning this topic are relevant and permissible. These communications from defendant to Penney are identified in the order referenced below (the government will provide a courtesy copy to the Court and counsel):

- Exhibit 1003: 5/02/04 E-mail from defendant to Penney;
- Exhibit 1028: 5/04/04 E-mail from defendant to Penney;
- Exhibit 1029: 5/04/04 E-mail from defendant to Penney.

E. Statements from Defendant Directed to Bob Penney Concerning a Generator.

The specific statement listed below concerns defendant's request to Bill Allen for installation of a generator at defendant's chalet as related to Bob Penney. The statement makes clear that Allen and defendant were working toward a common goal, the installation of generator to benefit defendant. This statement, like the statements concerning the dog noted above, is admissible as the

defendant's own statement under Rule 801(d)(2)(E). The government notes the existence of this joint venture between defendant and Allen, however, to demonstrate why questions to witnesses concerning this topic are relevant and permissible. The communication from defendant to Allen is found at the exhibit referenced below (the government will provide a courtesy copy to the Court and counsel):

- Exhibit 417: 10/19/99 E-mail from defendant to Penney;

IV. E-Mail and Other Correspondence Sent to Defendant and/or Forwarded by Defendant to Others are Adoptive Admissions.

The government also seeks to admit against defendant the substance of e-mail and other correspondence, including memoranda, sent to him as well as e-mails he forwarded to others, pursuant to Rule 801(d)(2)(B). Rule 801(d)(2)(B) permits the government to offer against defendant those statements which defendant "has manifested an adoption or belief in its truth." Fed. R. Evid. 801(d)(2)(B). Defendant's receipt and review of memoranda directed to him on particular topics from staff members, presumably at his request, as well as remarks in the memoranda or forwarded e-mail. A decision to forward an e-mail "manifested an adoption or belief in the truth of the information contained in the original email." Sea-Land Serv., Inc., v. Lozen Int'l, LLC, 285 F.3d 808, 821 (9th Cir. 2002) (quotation marks and alteration omitted) (holding that the trial court's failure to admit an e-mail was reversible error where first employee of company was forwarded an email by a second employee, first employee copied entire email and forwarded it on to third party with the message, "Yikes, Pls note the rail screwed us up . . . ."; in so doing, first employee was adopted the contents of the original message). This reasoning applies with equal logic to memoranda that have been requested by defendant from his staff. 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 801.31[3][b], at 801 56 (2d ed. 2002) ("A

party may adopt a written statement if the party uses the statement or takes action in compliance [with] the statement."); cf. Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1005 n.6 (3d Cir.1994) (holding that statements of company president, which were reprinted in company publications, were not hearsay but were instead admissible as adoptive admissions).

Furthermore, in the absence of explicit statements adopting the truth of the forwarded emails or memoranda, the Court may look to defendant's conduct, *i.e.*, his forwarding of the emails and the surrounding circumstances or addressing memoranda specifically to defendant, to conclude that he adopted the forwarded email or memoranda. United States v. Beckham, 968 F.2d 47, 51-52 (D.C. Cir. 1992) (a defendant's manifestation of "assent may be established through his conduct as through words.").

Here, defendant manifested his belief in what he was forwarding through both his words and conduct: His words suggested that he believed that the e-mails were accurate or agreed with what had been written, and his conduct, in passing the e-mails on, manifested a belief that the content of the e-mails was true. The e-mails are therefore not hearsay and the Court should allow their admission. As for memoranda, in this instance memoranda from staffer Barbara Flanders, they are plainly addressed to defendant, they have every indication that they were created at his request, and many include writing indicating his review of the documents and implicit acceptance of their accuracy (the government will provide a courtesy copy to the Court and counsel):

- Exhibit 461: 3/07/01 E-mail to defendant from Barbara Flanders and reply from defendant (regarding delivery of chair from Bob Persons to defendant).
- Exhibit 405: 8/24/98 E-mail from defendant to others (regarding chalet);
- Exhibit 406: 9/23/98 E-mail from defendant to others (regarding chalet);

- Exhibit 408: 10/08/98 E-mail to defendant from another and email from defendant (regarding chalet).

V. Conclusion.

For the reasons set forth above, each of the statements from defendant and each of the statements from others identified herein is admissible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Motion *in Limine* for Admission of Certain Statements from E-Mail and Other Correspondence to be served on the defendant's counsel via e-mail and hand delivery.

/s/ Brenda K. Morris