UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
No. 3:20CR435-1

UNITED STATES OF AMERICA **v.** **IZZAT FREITEKH**	**Trial Brief of Defendant Izzat Freitekh**

Pursuant to the Court's Standing Order governing criminal trials, Defendant Izzat Freitekh, by and through counsel, hereby submits his trial brief in this matter in order to address legal and evidentiary issues that he anticipates will arise at trial. This is not an exhaustive list of potential issues that may be raised through the course of trial.

I. Reference to Defendants

As this case involves multiple co-defendants present at different events, including two whose last name is Freitekh, Mr. Izzat Frietekh would ask that each Defendant be specified by first and last name when referring to specific occurrences alleged in the Indictment, instead of generally referring to all Defendants. *United States v. Gengler*, No. 1:08CR12, 2009 WL 5549225, at *19 (E.D. Va. Oct. 23, 2009) (holding that significant prejudice occurred when a witness who pled guilty to a false statement to the Securities and Exchange Commission testified that he never informed all defendants generally).

II. The Court should not provide a speaking indictment to the jury.

It is Defendant's belief that the United States may wish to provide a copy of the Indictment to the jury over his objection. Should the Court rule in favor of the United States' request, superfluous language should be stricken from the Indictment. *See* Fed. R. Crim. P. 7(c)(1) ("The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ."). The function of an indictment is to state the essential facts constituting the offense. *United States v. Edmond*, 924 F.2d 261, 269 (D.C. Cir. 1991). When more language is used than necessary, it may be improper or unnecessary. *United States v. Lawson*, No. CRIM.A. 3:08-21-DCR, 2009 WL 62145, at *2 (E.D. Ky. Jan. 8, 2009).

The dangers of confusion in this case are heightened where the Government has filed a motion in limine seeking to restrict the Defense from inquiring into matters that are discussed within the indictment.

III. Defendants' Out-of-Court Statements and the Rule of Completeness.

"If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, or any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time." Federal Rules of Evidence, Rule 106. The Rule

of Completeness is intended to ensure that any admitted portion of a previous statement or writing is placed in proper context. *United States v. Ricks*, 882 F.2d 885, 893 (4th Cir. 1989) (noting that the district court's requirement that the evidence be admitted in its entirety under Rule 106 was permissible because Rule 106 allows testimony which explains or clearly pertains to the limited portions sought to be introduced by the opposing party). "[W]here substantial parts of a prior statement are used in cross-examination of a witness, fairness dictates that the balance be received so that the jury will not be misled. *United States v. Rubin*, 609 F.2d 51, 63 (2d Cir. 1979), aff'd, 449 U.S. 424, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981).

In *United States v. Hemphill,* __ U.S. __, 2022 WL 174223 (January 20, 2022), the Court re-emphasized the rule

> Under the traditional rule of completeness, if a party introduces all or part of a declarant's statement, the opposing party is entitled to introduce the remainder of that statement or another related statement by the same declarant, regardless of whether the statement is testimonial or there was a prior opportunity to confront the declarant.

(Slip Opinion at 10) (Justice Alito concurring).

IV. Impeachment.

The Government has indicated that it will not call Dianne Carter, nor will it introduce her text messages. However, they indicated that they reserve the right to re-visit that issue.

In the unlikely event that her statement is introduced into evidence, Rule 806 permits her impeachment under any of the forms of impeachment listed under Rules 608 or 609. *See* Advisory Notes to Rule 806 ("The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified.").

V. Judicial Notice

Under Federal Rule of Evidence 201(b), the district court may judicially notice a fact that is not subject to reasonable dispute when it is either (1) generally known within the district court's jurisdiction, or (2) can be readily determined from an indisputably accurate source. This court and numerous others routinely take judicial notice of information contained on state and federal government websites. *See, e.g.*, *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004); *Garling v. U.S. Envtl. Prot. Agency*, 849 F.3d 1289, 1297 n.4 (10th Cir. 2017); *Swindol v. Aurora Flight Sci. Corp.*, 805 F.3d 516, 519 (5th Cir. 2015).

A. PPP Records do not meet the Business Records exception

Prior statements are not hearsay if contained in business records as defined in Fed. R. Evid. 803(6). Relevant requirements are that, the record was kept in the course of "regularly conducted activity," that "making the

record was a regular practice of that activity," and that "that documents were not created for "personal purpose[s] … or in anticipation of any litigation so that the creator of the document 'had no motive to falsify the record in question.'" *United States v. Kaiser*, 609 F.3d 556, 574 (2d Cir. 2010). *See also*, *Doali-Miller v. SuperValu, Inc.,* 855 Supp.2d 510 (D.Md. 2012) "Put simply, the fact that a record was made in anticipation of pending litigation suggests that it will not satisfy the requirements of Rule 803(6)."

1. They are not regularly kept records of a regular activity.

According to commentary to the rule, " The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point."

Here, PPP loans were not a regularly conducted activity by either the banks or the Fintechs. The PPP loans were an anomaly, not a regular business practice. *See* First Superseding Indictment at p. 3, (the CARES Act was "designed to provide emergency financial assistance."). The process was short-lived, lasting from March, 2020, until May, 2021. *See* www.sba.gov/funding-programs/loans/covid-19-relief-options.

Records relating to PPP loans were not "regularly conducted activity." F.R.E. 803(6). Thus the Court should decline to allow self-authentication of business records for PPP activity.

Additionally, it is unclear whether the records produced in discovery were prepared and compiled by Bank of America in order to respond to a grand jury subpoena, as opposed to kept in the ordinary course of business.

2. The records contain double-hearsay

Some of the records provided by the Government contain inadmissible hearsay within hearsay, even if the business records exception is otherwise met. Those records include information that comes from outside sources, which the Fourth Circuit has held prevents those records from coming in under the business records exception.

In *United States v. Pendergrass,* 47 F.3d 1166 (4th Cir., 1995) (unpublished), the court reversed a defendant's money laundering conviction where purported business records should not have satisfied the hearsay exception. The court held:

> When the source of the information in the business record is an outsider, the only way to save the record from the jaws of the hearsay exclusion is to establish that the business recipient took precautions to guarantee the accuracy of the given information.

Id. at *5 (citing *United States v. McIntyre,* 997 F.2d 687, 700 (10th Cir., 1993) and *United States v. Patrick,* 959 F.2d 991, 1001 (D.C. Cir., 1992).

The court noted that "an essential link in the trustworthiness chain fails…when the person feeding the information does not have firsthand knowledge." *Id.* (citing *McCormick on Evidence,* § 290, 274 (4th Ed., 1992).

Here, the same issue arises. The corporations supplying the records will not be able to demonstrate that steps were taken to verify the information, such as loan applications, that were submitted to them. The corporations did not verify by phone or IP address that Izzat Freitekh was the one to submit the applications, and they should not be admitted under the business records exception.

VI. Potential Hearsay issues.

A. Non-hearsay.

A statement is only hearsay if it is offered 'to prove the truth of the matter asserted.' Fed. R. Evid. 801(c). "Testimony offered only to show statement was made without regard to its truth or falsity is not hearsay." *Barnes v. Prudential Ins. Co.,* 76 F3d 889 (8th Cir., 1996) (statement not hearsay if "does not depend on the truth or falsity … but only upon whether he made the statements.").

A statement is not hearsay if its purpose is only to show the effect on the listener. "Statements are not hearsay if offered to prove that because they were made, listeners had notice of knowledge of the information relayed in the statements. If a statement is offered for its effect on the listener, in

order to explain the listener's conduct, it does not matter what there the declarant was telling the truth." Saltzburg et. al, Federal Rules of Evidence Manual, § 801.02[1][f]. *See also, United States v. Hanson,* 994 F2d 403 (7th Cir., 1993) (Statement made to defendant that he did not have to file a certain form was not offered for its truth but rather for its impact on a defendant's state of mind."); *United States v. Cantu,* 876 F.2d 1134 (5th Cir., 1989) (error to exclude defendant's testimony regarding statements made by a witness that "were offered as evidence of Cantu's state of mind.") *United States v. Detrich*, 865 F.2d 17 (2d Cir. 1988) ("Where, as here, the statement is offered as circumstantial evidence of Detrich's state of mind, it does not fall within the definition given by Rule 801(c), because it was not offered to prove the truth of the matter asserted.").

B. Testimony where the door was opened

While hearsay testimony is generally inadmissible, Any out-of-court statement is constitutionally admissible so long as it falls within an exception to the hearsay rule. *United States v. Saget*, 377 F.3d 223, 226 (2d Cir. 2004).

A court may admit such testimony if the opposing party "opened the door" by soliciting similar testimony herself. *See United States v. Craig,* 358 Fed.Appx. 446 (4th Cir., 2009); *see also, United States v. Hemphill,* __ U.S. __, 2022 WL 174223 (January 20, 2022) ("Under the traditional rule of completeness, if a party introduces all or part of a declarant's statement, the

opposing party is entitled to introduce the remainder of that statement or another related statement by the same declarant, regardless of whether the statement is testimonial or there was a prior opportunity to confront the declarant.).

In *United States v. Williams,* 106 F.3d 1173, 1177 (4th Cir.1997) on cross examination, defense counsel asked a government agent whether he had personal knowledge of any dealings between the defendant and an informant; the agent responded that he did not. On re-direct examination, the prosecutor asked, "[a]nd did [the informant] say whether or not he had ever obtained methamphetamine from the defendant?" The agent answered "yes." *Id.* at 1177. The defense objected to the statement as hearsay, the court overruled the objection because the defense had "opened the door," and the Court affirmed.

C. State of Mind

Statements are admissible under F.R.E. 803(3) if they show "the declarant's then existing state of mind ... (such as intent, plan, motive)." *See e.g., See United States v. Jenkins,* 579 F.2d 840, 842–43 (4th Cir.1978). ; *United States v. Dupre*, 462 F.3d at 137 (messages were not hearsay, because they were not offered to prove the truth of the matter asserted); *Smith v. Duncan*, 411 F.3d 340, 346 n.4 (2d Cir. 2005) ("[T]he mere utterance of a statement, without regard to its truth, may indicate circumstantially the

state of mind … of the declarant and is not hearsay.".); *see also, United States v. Hanson,* 994 F2d 403 (7th Cir., 1993) (Statement made to defendant that he did not have to file a certain form was not offered for its truth but rather for its impact on a defendant's state of mind."); *United States v. Cantu,* 876 F.2d 1134 (5th Cir., 1989) (error to exclude defendant's testimony regarding statements made by a witness that "were offered as evidence of Cantu's state of mind.")

D. Chain of circumstances

A statement is admissible whenever the declarant's intention itself is a distinct and material fact in the chain of circumstances. *See Mutual Life Ins. Co. v. Hillmon,* 145 U.S. 285, 295, (1892) (holding admissible statements that a declarant intended to travel to meet a particular person when he was never heard of again). Such a statement of intent is admissible under the state of mind exception to the hearsay rule to promote an inference of the declarant's future conduct. *See United States v. Jenkins,* 579 F.2d 840, 842–43 (4th Cir.1978). Moreover, a declarant's belief is admissible to show what the declarant believed about a particular incident. *See United States v. Hairston,* 46 F.3d 361, 365 (4th Cir.1995).

VII. The Proposed Summary Charts cannot satisfy Rule 1006 because their selectiveness misleads the jury

The Court must also ensure that the records provide "an objectively accurate summarization of the underlying documents, not a skewed selection of some of the documents to further the proponent's theory of the case." *United States v. Oloyede,* 933 F.3d 302, 311 (4th Cir., 2019) (trial court erred in admitting summary charts where the summary charts included very selective transfers, thus painting a misleading picture of bank account activity); *see also, United States v. Garcia*, 413 F.3d 201, 214 (2d Cir. 2005) (holding even if the disputed testimony were considered summary evidence, such testimony would be improper and therefore not qualify as "helpful" to the jury); *United States v. Griffin*, 324 F.3d 330, 349 (5th Cir. 2003) ("unequivocally condemn[ing]" the use of an overview witness "as a tool employed by the government to paint a picture of guilt before the evidence has been introduced.").

Here, the charts are not meant to summarize, or serve as a surrogate for evidence. They are instead arguments to the jury.

For example, the bank statements break out the incriminatory transactions, but do not do the same for regular transactions—for example supplies, Uber eats fees, payments to employees, and all the other hundreds of other expenses that pop up for restaurants.

In its last filing, the Government went so far to refer to the summary exhibits as a presentation. A presentation is the correct description—because the exhibits are argument and do not come in under Rule 1006.

VIII. The Court should not apply the same materiality standard to Fintechs that it would apply to banking institutions.

Fintech lenders provided a significant portion of PPP loans. The indictment against the defendants also references loan applications sent to Fintech companies in addition to traditional lenders. *See* Doc. 34 at pp. 2, 7.

Fourth Circuit cases have treated "traditional financial institutions" differently than other individuals when evaluating materiality. *See, e.g., United States v. Raza*, 876 F.3d 604, 619 (4th Cir. 2017). In those cases, the Circuit held that the trial court could instruct the jury to ask what a reasonable financial institution might find material.

However, a Fintech is not a traditional financial institution, and its motivations with respect to the PPP might not be the same, particularly when the loans and processing fees are fully guaranteed. A Fintech has no skin in the game. They collect a processing fee, but accept no risk. These Fintechs have been under SBA, FTC, and Congressional scrutiny in relation to PPP loans. *See,* https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-lendio.pdf and https://coronavirus.house.gov/news/press-

releases/select-subcommittee-launches-investigation-role-fintech-industry-ppp-fraud.

The burden of proving materiality falls on the Government and it has not shown that Fintechs should be treated the same as traditional financial institutions. Simply because the Government suggests they should be treated the same does not mean that they should.

Instead, the Government should be required prove subjective materiality with respect to the Fintechs. *See, e.g., United Health Services v. United States,* 579 U.S. 176, 190 (2016) ("not every undisclosed transaction…automatically triggers liability."); *see also, Neder* at 16 ("false statement is material if it has a natural tendency to influence or is capable of influencing"); *Kungys v. United States*, 485 U.S. 759, 770 (1988).

IX. 404(b) Evidence

As set forth in Defendant's Motion to Exclude the 404(b) evidence, the proposed evidence does not satisfy any of the purposes set forth in Rule 404(b) and is otherwise irrelevant.

However, should the Court decide otherwise, the Government must still demonstrate that Defendant committed the acts in question by a preponderance of the evidence. *See, e.g., Huddleston v. United States,* 485 U.S. 681 (1988).

Finally, should the evidence come in, the Defense is able to respond by introducing evidence of specific acts of conduct by the Defendant. *See* F.R.E. 405(b). Even if the Court does not admit the 404(b) evidence, the Defendant is otherwise eligible to present such evidence of honesty and law-abiding character given that the Defendant is charged with false statements. *See Id.*

Finally, the Defense reserves the right to present its own 404(b) evidence, as included in its reciprocal discovery, and will provide notice of the same to the Government.

Respectfully submitted, this __ day of March, 2022.

s/Rob Heroy
W. Rob Heroy & Michael J. Greene
Bar Nos. 35339/29237
Attorney for Defendant Izzat Freitekh
Goodman, Carr, PLLC
301 S. McDowell St., Ste. 602
Charlotte, NC 28204
Phone: 704-372-2770
Rheroy@goodmancarr.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Trial Brief was served on the Assistant United States Attorneys Mark Odulio, Joshua Debold, and Matthew Kahn, and to Stephen Lindsay, through ECF.

This, the __ day of March 2022.

s/ Rob Heroy
W. Rob Heroy