

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

-v- :

09 CR 00471 (WHP)

JOSEPH PREBUL, :

:

Defendant.

-----X

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS THE INDICTMENT, OR IN THE ALTERNATIVE FOR THE
EXCLUSION OF EVIDENCE PURSUANT TO FED. R. EVID. 408 AND 403**

SERCARZ & RIOPELLE, LLP
152 West 57th Street, 24th Floor
New York, New York 10019
Telephone: 1-212-586-4900
Attorneys for Joseph Prebul

Defendant respectfully submits this memorandum of law in support of his motion to dismiss the Indictment pursuant to Fed. R. Crim. P. 12(b) and Fed. R. Evid. 408, or in the alternative, for the exclusion of certain evidence under Fed. R. Evid. 408 and 403.

STATEMENT OF FACTS

Background

During the period covered by the Indictment, the defendant owned a series of automobile dealerships in Chattanooga, Tennessee, including Prebul Jeep Inc. (“Prebul Jeep”). See Declaration of Maurice H. Sercarz at ¶ 3 (“Sercarz Declaration”). In order to finance the purchase of automobiles the dealerships relied upon asset-based lending services provided, at various times, by Wachovia Bank (“Wachovia”) and Chrysler Financial Services Americas LLC (“Chrysler”). See id. at ¶ 4.

In each instance, the dealerships were loaned money through an account commonly referred to as the wholesale floorplan account. See id. at ¶ 5. Each lender offered the dealerships an opportunity to offset the principal balance on the loans by depositing funds either into the floorplan account, or, into a separate account, commonly called the “offset account.” Id. At times, the offset account paid interest, while at other times it merely served to reduce the balance in the floorplan account. See id.

The Allegations in the Indictment

The Indictment charges that from in our about 2004 through in or about July 2008, the defendant engaged in a scheme to defraud an individual identified as “Victim-1” along with members of his family by inducing these individuals to send him millions of dollars under

false pretenses. See id. at ¶ 6.¹

The cash transfers from Bensusan and his sons were all made on behalf of one of three corporate entities operated by the Bensusans: (i) Alliance Investments Group LLP, (ii) TSE Group LLC, and (iii) 117 7th Avenue LP. See id. at ¶ 7. Each of the entities received a monthly statement from an employee at Prebul Jeep outlining the amounts owed to that entity. See id.

All of the transfers were sent from the Bensusan entities to an account held by Prebul Jeep at FSG Bank, which served as the general operating account for all of the dealerships. All of the repayments of principal and interest payments to the Bensusan entities were made from this account. See id. at ¶ 8.

The defendant allegedly represented that the money would be invested in an account with Chrysler where it would earn an above average rate of interest (presumably, the offset account), that it would remain segregated in that account, and, that the money would be immediately accessible to the investor. See id. at ¶ 9. According to the Indictment, the money was instead used by the defendant in the operation of his automobile dealerships. See id.

According to the Indictment, in or about July 2008, Danny Bensusan requested the immediate return of approximately \$6.5 million. See id. at ¶ 10. The defendant and Prebul Jeep were able to return only \$4.5 million. See id. Bensusan thereafter demanded the return of the additional \$2 million. See id.

As of the end of July 2008, neither the defendant nor Prebul Jeep had complied with the demand. See id. at ¶ 11.

¹ Victim-1 has been identified both in informal conversations with the Assistant United States Attorneys in this case, and in discovery material, as Danny Bensusan. Bensusan's sons, Steven Bensusan ("Steven") and Tsion Bensusan ("Tsion"), participated in their father's business operations and interacted with the defendant as discussed herein.

The Nature of the Dispute

As of the end of July 2008, there was, at the very least, a dispute regarding whether the defendant made any or all of the allegedly false representations outlined in the Indictment in order to obtain the money, and whether the money was applied in violation of the promises that were made. See id. at ¶ 12.

The Recorded Conversations Capture Attempts To Resolve The Dispute

The government has provided in discovery audio recordings of a series of conversations between the defendant and the Bensusans beginning on July 31, 2008. See id. at ¶ 13. Each of the tapes was made by the Bensusans without the knowledge of the defendant and others speaking on his behalf.² See id. The government produced the following audio recordings:³

- six telephone calls on July 31, 2008 between the defendant and Danny Bensusan's son, Steven Bensusan (9:03 am, 9:39 am, 10:08 am, 11:16 am, 11:30 am and 6:29 pm);
- in-person meeting on August 1, 2008, between defendant, Danny Bensusan, and his sons Steven Bensusan and Tsion Bensusan;
- a telephone call on August 1, 2008 between the defendant and Steven Bensusan;

² Wayne Peters, defendant's attorney, participated in the 9:39 am, 10:08 am, 11:16 am and 11:30 am calls on July 31, 2008. Moreover, prior to the defendant's conversations with the Bensusans, Mr. Peters had advised the defendant regarding what he should say during the negotiations, including what areas of the conflict to avoid and which avenues of negotiation to pursue. See Sercarz Declaration at ¶ 15. We deliberately avoid describing these conversation in full because of issues regarding waiver of the attorney client privilege. However, if the Court requires further fact finding in order to rule on our motions, we are prepared to produce an affidavit or testimony from Mr. Peters detailing his advice to the defendant. See id. at n.2.

³ Defendant believes there may be additional audio recordings that were not produced. The defendant reserves his right to object to the introduction of any additional audio recordings at trial.

- a telephone call on August 4, 2008 between the defendant and Danny Bensusan; and
- a telephone call on November 23, 2008 between the defendant and Danny Bensusan

See id. at ¶ 14 and Exhibit B.

During the conversations, the defendant agrees to assume responsibility for the repayment of the outstanding principal balance and interest. See id. at ¶ 16. Throughout the conversations the defendant discusses efforts to sell off both personal assets and assets of the dealerships in order to meet this obligation. See id. However, despite being confronted with claims that he obtained the money under false pretenses, at no time does the defendant admit to having engaged in a fraud. See id.

On August 1, 2008, the defendant traveled to New York to meet with the Bensusans. See id. at ¶ 17. At the meeting he signed a promissory note, payable on demand, personally obligating him to pay the full outstanding amount at a rate of interest of 10%.⁴ See id. and Exhibit C.

Thereafter, the parties, and their attorneys discussed the terms of a forbearance agreement in which the Bensusans would refrain from enforcing the note, in exchange for agreements giving them a security interest in a variety of the defendant's investment properties. See id. at ¶ 18 and Exhibit D. These negotiations never succeeded in producing a signed forbearance agreement. See id. Nor was the defendant able to pay the amounts owing to the Bensusans. See id.

⁴ The amount on the note exceeds the amount for which the defendant could be held liable. The defendant is a part owner of the TSE Group LLC, and is, therefore, promising to repay an entity in which he has a large ownership stake. See id. at n.3.

On February 9, 2009, a complaint was filed in the Southern District of New York and a warrant was issued for the arrest of the defendant. See id. at ¶ 20.

Related Proceedings

On February 11, 2009, Prebul Jeep filed a voluntary petition for Chapter 7 bankruptcy in the Eastern District of Tennessee. See In re Prebul Jeep, Inc., No. 09-10838 (Bankr. E.D. Tenn.).

On February 12, 2009, Danny Bensusan filed a civil suit in Hamilton County, Tennessee against the defendant and others. See Danny Bensusan v. Joseph Prebul, et al., No. 09C239 (Circuit Court, Hamilton County, Tennessee). Danny Bensusan withdrew this action, and on March 20, 2009 filed a similar civil action in federal court in the Southern District of New York against the defendant and one other individual. See Danny Bensusan v. Joseph Prebul and Julius Greenwald, No. 09-cv-2595 (S.D.N.Y.) (Sand, J.).

On or about March 17, 2009, the bankruptcy trustee initiated a civil proceeding against Danny Bensusan and several related parties, seeking to avoid certain transfers of monies by Prebul Jeep. See Farinash v. Danny Bensusan, et al., No. 9-01041 (Bankr. E.D. Tenn.).

On July 16, 2009, the defendant filed a voluntary petition for Chapter 7 bankruptcy in the Eastern District of Tennessee. See In re Joseph Prebul, No. 09-14010 (Bankr. E.D. Tenn.).

The Recorded Conversations Were Utilized In The Grand Jury

The Indictment contains the following three paragraphs – central to the instant motion – which explicitly rely on descriptions of the recorded conversations between the defendant and the Bensusans:

14. On or about July 31, 2008, during a consensually recorded conversation between Victim-1 and JOSEPH PREBUL, the defendant, PREBUL admitted that he owed Victim-1 money. In addition, PREBUL falsely claimed that the Chrysler CMP Account had no money left. In fact, there was approximately \$700,000 in the CMP Account as of July 31, 2008.
15. On or about August 4, 2008, during a consensually recorded conversation between Victim-1 and JOSEPH PREBUL, the defendant, PREBUL admitted to Victim-1 that PREBUL used and caused others to use Victim-1's money for expenses related to PREBUL's car dealerships.
16. In or about August 2008, JOSEPH PREBUL, the defendant, met with Victim-1 in New York, New York. During that meeting, PREBUL admitted that he owed millions of dollars to Victim-1. PREBUL gave a document to Victim-1 at that meeting stating the PREBUL owed Victim-1 a little more than approximately \$7,641,000, which represented the amount of Victim-1's principal investment plus interest that PREBUL represented Victim-1 would get by investing in the Chrysler CMP Account.

See Sercarz Declaration at ¶ 24.

ARGUMENT

I. THE INDICTMENT MUST BE DISMISSED AS IT WAS OBTAINED IN RELIANCE ON INADMISSIBLE EVIDENCE

A. The Audio Recordings Are Statements Made In Compromise Negotiations And Therefore, Are Inadmissible Evidence Pursuant To Fed. R. Evid. 408

Federal Rule of Evidence, Rule 408, precludes the introduction into evidence of statements made during settlement negotiations. Specifically, Rule 408 provides:

(a) Prohibited uses.--Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses.--This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408 (2009).

The Rule furthers the policy of promoting settlements and honesty in settlement negotiations. See Rule 408 advisory committee notes. After all, if an offer to settle a dispute could be used as evidence in subsequent litigation, parties would seldom come to the negotiating table. See Dimino v. New York City Transit Auth., 64 F. Supp. 2d 136, 161 (E.D.N.Y. 1999). As a result, the rule provides “wide protection to both the fact of the settlement or offer to settle and to negotiations and conduct associated with settlement or offer to settle. The rule also protects admissions of facts made by parties during settlement negotiations, in order to allow parties a greater degree of honesty and, therefore, a greater ability to reach a compromise.” Id. (emphasis added).

The Rule is clearly applicable in criminal cases.⁵ The impact of evidence

⁵ We note that the previous circuit court split as to Rule 408’s application to criminal cases was resolved with the 2006 Amendment to the Federal Rules of Evidence. See Fed. R. Evid. 408 advisory committee notes, 2006 Amendment (discussing admissibility of statements during compromise negotiations as to a civil dispute by a government agency and stating “[o]f course, statements made during compromise negotiations of *other* disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims”) (emphasis added); see also United States v. Stein, 05-cr-0888, 2007 WL 3009650, at *2 (S.D.N.Y. Oct. 15, 2007) (discussing defendant’s argument to exclude evidence pursuant to Rule 408 in a criminal case); United States v. Roti, 484 F.3d 934, 936 (7th Cir. 2007) (noting that “new” Rule 408 applies to both civil and criminal litigation).

regarding a civil settlement is magnified in a subsequent criminal proceeding, where the stakes are higher than in a civil matter. See United States v. Arias, 431 F.3d 1327, 1337-38 (11th Cir. 2005); United States v. Bailey, 327 F.3d 1131, 1145 (10th Cir. 2003); United States v. Hays, 872 F.2d 582, 589 (5th Cir. 1989). Indeed, the plain language of the current version of Rule 408 confirms that the Rule applies in criminal cases with the exception only of those in which the statements sought to be excluded under the Rule involve a claim by a public office or agency. See Fed. R. Evid. 408(a)(2). Any other reading of the statute would render the reference to criminal cases in this section of the statute unnecessary. See Weinstein's Federal Evidence § 408.02[5][b][ii] & n.26 and cases cited therein (2d ed.).

As demonstrated below, the recorded conversations are precisely the type of evidence precluded by Rule 408. They occurred during the dispute that arose as a result of the failure of the defendant and Prebul Jeep to meet Danny Bensusan's demand for money. The recorded conversations capture statements that were made by the defendant in the effort to resolve the disputed issues by providing a promissory note and discussing the repayment of the amounts owing – while refusing to admit allegations of fraud. And, the conversations were offered before the grand jury in order to establish the validity of the claim – an indispensable element of the defendant's guilt on the crimes charged.

Finally, the conversations captured on the recordings were a critical part of the evidence presented to the grand jury in support of the scheme to defraud. As a result, the grand jury voted for an indictment based in large part on inadmissible evidence. Accordingly, the proper remedy is to dismiss the indictment. See Dimino, 64 F. Supp. 2d at 161; United States v. Bein, 728 F.2d 107, 113 (2d Cir. 1984) (noting that it would not be permissible if reliance on

inadmissible evidence was so extensive as to mislead the grand jury as to the strength of the evidence).

1. The recorded conversations occurred during an actual dispute

For a disputed claim to exist for purposes of Rule 408, “all that is needed is an actual dispute or an apparent difference of opinion between the parties as to the validity of a claim.” Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81, 93 (S.D.N.Y. 1995) (citations omitted).

As of July 31, 2008 there was, at the very least, an apparent difference of view as to whether the defendant made any or all of the allegedly false representations outlined in the Indictment in order to obtain the money, and whether the money was applied in violation of the promises that were made.⁶

The defendant never agrees with, nor does he admit that such accusations are correct, instead focusing on his effort to repay the money. Standing alone, this suggests a difference of opinion between the parties. Indeed, the defendant argues that he never misappropriated the money. In response to an inquiry from Danny Bensusan as to what happened to the money, the defendant explains: “I don’t have all the answers Danny. This money has been in the dealership, it’s not gone out and bought houses or anything like that. It’s not gone out. I’m going to have Donnie’s group come in and give us answers.” Ex. B, August 4, 2008 call.⁷

⁶ The resulting civil litigation brings into stark relief several additional areas of actual dispute including: (i) whether the transfers were “investments” or “loans”, (ii) whether the obligation to repay is that of the defendant, Prebul Jeep, or both, and (iii) whether the transfers were obtained by fraud.

⁷ The defendant is referring to his external accountant, Donnie Hutcherson.

S & S Tobacco & Candy Co., Inc. v. Stop & Shop Companies, Inc., Nos. 95 Civ. 9263 and 95 Civ. 9265, 1997 WL 35327, 107 F.3d 4 (2d Cir. Jan. 30, 1997), is instructive and highlights the existence of a dispute in the instant case. In S & S Tobacco, a complex case giving rise to multiple claims and cross-claims, the district court found that S & S Tobacco had breached its contract with Stop & Shop by retaining a 3.25% cash discount offered by cigarette manufacturers on incremental price increases. See id. at *1. The court, however, ultimately found that the breach was immaterial. See id. at *2. On appeal, among other contentions, Stop & Shop claimed that the district court erred in refusing to admit into evidence statements made by the S & S Tobacco's officials during settlement negotiations. See id. at *1. Stop & Shop argued that the statements were not precluded by Rule 408 because S & S Tobacco admitted to retaining the 3.25% cash discount and therefore, there was no "disputed claim." Id. at *3. The Second Circuit rejected this argument and found that there was ample evidence to support S & S Tobacco's claim that it "disputed the validity of [defendant's] claim of *wrongful* overcharge." Id. at *4 (emphasis in original). The court explained:

Although S & S Tobacco acknowledged that it *knowingly* retained the 3.25 percent cash discount, it also claimed that it honestly believed that it was entitled to retain this amount. S & S Tobacco's offer during the negotiations to refund the retained amount to Stop & Shop is precisely the type of admission protected by Rule 408."

Id. (citing Duse v. IBM, 748 F. Supp. 956, 963 (D. Conn. 1990)) (emphasis in original).

Moreover, during the period between July 31, 2008 and November 2008, the defendant's attorney participated in the discussions, and advised his client with regard to signing both a promissory note and regarding the terms of an appropriate forbearance agreement. See Alpex Computer Corp. v. Nintendo Co., 770 F. Supp. 161, 165 (S.D.N.Y. 1991) (finding that evidence was barred under Rule 408 partly due to the fact that "the communications in this case

took place largely between lawyers”); Olin Corp. v. Insurance Co. of North America., 603 F. Supp. 445, 450 (S.D.N.Y. 1985) (participation of outside counsel in negotiations is a relevant factor in determining whether a dispute exists for Rule 408 purposes).

And, when it became clear that the defendant could not made good on his promise to pay, both the defendant’s arrest and a variety of civil suits followed. See Commodity Futures Trading Commission v. Murray Ira Rosenberg, 85 F. Supp. 2d 424, 433 & n.10 (D.N.J. 2000) (finding that recordings were inadmissible under Rule 408 based in part on threat of legal action and statement that “laws have been broken here”).

Finally, the policies that favor exclusion of evidence involving settlement negotiations, call for a broad application of the Rule to all kinds of disputes including those where the amount owed or interest is not at issue, but the nature of the transaction is the subject of disagreement. See Weinstein’s Federal Evidence, at § 408.06.

2. The recorded statements capture negotiations to resolve the disputed claims

Once a dispute has been established, the Rule sweeps broadly to cover all conduct and statements during negotiations. Id. at § 408.05[2]. Clearly the discussions taking place on the recordings qualify as “negotiations.”

The first recorded call is between Danny Bensusan’s son, Steven Bensusan and the defendant. Steven asks the defendant what can be done if he does not have the money to pay back the Bensusans, and the defendant replies, “I’ll have to start liquidating some stores and that’s just the way it’ll have to be.” Ex. B, July 31, 2008 9:03 am call. By the second call, thirty-six minutes later, the defendant’s attorney, Wayne Peters, is participating in the negotiations. In fact, the third and fourth calls on July 31, 2008 are placed by Steven to Mr. Peters’s law firm.

Ultimately, that same day, the Bensusans ask the defendant to come to New York so that Danny Bensusan and the defendant “can figure this out.” Ex. B, July 31, 2008 11:30 am call. Indeed, as stated by Danny Bensusan, the entire purpose of the August 1, 2008 in-person meeting was as follows:

We came in here for one purpose. For him to tell us the condition of these [sic] business. And how he can pay for it. And this is what I care about right now.

Ex. B, August 1, 2008 meeting.

The negotiations captured on the recorded conversations have several recurrent themes: (i) the Bensusans’ demands for the immediate return of at least \$2,000,000; (ii) discussions regarding the various assets owned by the defendant and how he can liquidate them to quickly raise money to pay back the Bensusans; and (iii) the time table for the return of funds.

a. the Bensusans’ demands for money

On several occasions, the Bensusans’ seek the immediate return of \$2,000,000 with a schedule for the return of the remainder. During the July 31, 2008 9:39 am call between Steven Bensusan, the defendant, and his attorney, Steven Bensusan tells the defendant:

He [Danny Bensusan] needs two million immediately, otherwise he’s going to lose \$1.5mm on this deal. And I don’t know what we’re going to do. I mean this is a big problem. The rest of the money we can figure out a time table, something. But this two million, we need to figure out how to get it now.”

Ex. B, July 31, 2009 9:39 am call.

During the August 1, 2008 in-person meeting, Danny Bensusan also makes clear that he needs the \$2,000,000 before the parties can discuss and resolve other matters, when he states:

Let me tell you the issue here. For my deal, [inaudible] Moshe to give me two million to continue with my deal, which I postponed the closing until Tuesday. For me to work out, those two million have to be returned to Moshe immediately, as soon as possible, number one.⁸

See id. (emphasis added).

Later during the meeting, Danny Bensusan reiterates:

Those two million I need to clear up as soon as possible. I can wait – I can give you year, year and a half to give me the rest. But this two million, I can, I need immediately to give it back to him [Moshe] because he’s doing me a favor.

...

As long as we get every first of the month the interest check, do whatever you can to do to bring Moshe’s two million back that I am going to borrow this week to go to closing on my deal done. And then from there, just tell me whatever you have.

See id.

By November 23, 2008, Danny Bensusan makes clear that he will not continue to negotiate the repayment of the money with the defendant until he receives some money – again, a sure indication that the parties are negotiating. See Rosenberg, 85 F. Supp. 2d at 433-34 & n.11 (finding that statement “What I want you to do is wire me the money now, and then I’ll meet with you. That’ll be a sign of good faith.... If you would wire me the 160-the 116,000 bucks, to begin with, then we’ve got something to work with . . .” was a “precursor to settlement” and a “term or condition of settlement negotiations” that clearly brings the conversations “within the sweep of Rule 408”).

⁸ Danny Bensusan was seeking alternative sources to quickly borrow \$2,000,000 so that he could close a deal for which he had already put down a \$1,500,000 deposit. One such individual was Moshe Azuley. During one of the July 31, 2008 telephone calls, Steven told the defendant and his attorney that Danny is “going to want to see Joe sign some notes that show exactly how much he owes us. That’s probably going to be the only way for Danny to get the money from Moshe” Ex. B, July 31, 2008 11:16 am call. Asking the defendant to sign a note is additional evidence that these conversations are pure negotiations between the parties.

b. discussions regarding the defendant's efforts to liquidate assets

The audio recordings are replete with conversations between the defendant and the Bensusans wherein the defendant details what he owns, and the parties discuss how he can sell those assets to pay back the loan. During the very first recorded call, Steven asks the defendant what can be done if he does not have the money to pay back the Bensusans, and the defendant replied: "I'll have to start liquidating some stores and that's just the way it'll have to be." Ex. B, July 31, 2008 9:03 am call. This is a recurring discussion point throughout the recorded conversations. See Ex. B, July 31, 2008 6:29 pm call (the defendant states "Steven, I am going to have to liquidate some things. As the market comes back I'm going to have to sell things."); Ex. B, August 1, 2008 meeting (the defendant discusses with the Bensusans the possibility of selling a small commercial building, a building with a drug store tenant, and a building on Amnacula Highway in Tennessee, and the recent sale of a building and the expected receipt of \$800,000); Ex. B, August 1, 2008 meeting (Danny Bensusan proposes defendant's partners in one of his dealerships buy him out); Ex. B, August 4, 2008 call (the defendant explains to Danny Bensusan that he just met with his accountant and lawyer for three and one half hours and that they are identifying all of his assets and starting to put real estate up for sale).

The defendant also had several conversations with Steven Bensusan during which they discuss the possibility of the defendant borrowing money from friends. See Ex. B, July 31, 2008 9:39 am call (Wayne Peters tells Steven that they've met with some potential people to loan the defendant money); Ex. B, July 31, 2008 10:08 am call (Wayne Peters tells Steven "[w]e're talking to more of Joe's friend to see if we can figure anything out there."); Ex. B, July 31, 2008 11:16 am call (Wayne Peters discusses the possibility of the defendant's friend, Gary, paying Danny Bensusan the \$2,000,000 and Danny would acquire Gary and the

defendant's ownership in a jazz club co-owned by Danny Bensusan, which the defendant refers to as a "short term solution"). Steven Bensusan acknowledges that the calls are efforts by the defendant to compromise, when at the end of the July 31, 2008 10:08 am call he tells the defendant and his lawyer: "Look, why don't you guys try to, I don't know, keep going and I'll be back later. But like I said, I mean he's - we have to find some sort of solution." Ex. B, July 31, 2008 10:08 am call. The parties also discuss collateral that the defendant can use in support of the outstanding funds. See Ex. B, August 1, 2008 meeting (Steven Bensusan asks the defendant about the possibility of using the real estate that his dealerships sit as collateral).

c. the promissory note

At the very beginning of the meeting on August 1, 2008, the defendant and the Bensusans discuss the terms of a promissory note, which the defendant – after review by his attorney – executes. See Ex. B, August 1, 2008 meeting. The fact that there was a promissory note – by which the defendant acknowledged that he would be personally responsible for the loan, and agreed to make monthly interest payments at a higher rate of interest than the floorplan rate – is strong evidence of compromise negotiations. See Rosenberg, 85 F. Supp. 2d at 434 (finding that application of Rule 408 was "clear" in part due to defendant's offer to pay \$100,000 per year for three years); cf. Highland Capital Management, L.P. v. Schneider, 551 F. Supp. 2d 173, 197 (S.D.N.Y. 2008) (finding that the parties' Tolling Agreement "evidences compromise").

During several of the conversations, the parties also discuss how long it will take the defendant to sell assets and obtain money to repay the Bensusans. See Ex. B, August 1, 2008 meeting (the defendant discusses how long it will take to receive money from the sale of various

assets, including real estate, dealerships and other assets); see id. (Danny tells the defendant “I can wait – I can give you year, year and a half to give me the rest”).

In sum, it is indisputable that the recorded conversations are precisely the type of evidence that is precluded by Rule 408 – “conduct or statements made in compromise negotiations regarding the claims.” Fed. R. Evid. 408(a)(2).

3. The recorded conversations were utilized in the grand jury to prove the validity of the claim, and defendant’s involvement in a fraudulent scheme

The audio recordings are explicitly referenced in the indictment under the heading “The Scheme Unravels.” Ex. A, at p. 6. Paragraph 14 of the Indictment alleges that “during a consensually recorded conversation between Victim-1 and JOSEPH Prebul, the defendant, PREBUL admitted that he owed Victim-1 money.” Id. at ¶ 14. The Indictment also avers that “during a consensually recorded conversation ... PREBUL admitted to Victim-1 that PREBUL used and caused others to use Victim-1’s money for expenses related to PREBUL’s car dealership.” Id. at ¶ 15. Paragraph 16 of the Indictment refers to a meeting in New York in or about August 2008, during with the defendant admitted that he owed millions of dollars to Victim-1. See id. at ¶ 16.

Certainly, the government utilized the audio recordings as proof of the defendant’s liability on Bensusan’s claim for money; an indispensable element of his guilt.

4. None of the “permitted uses” are applicable in the instant case

A court considering the admissibility of a settlement for “another purpose” must take into account the public policy in favor of the settlement of disputes that underlies Rule 408, and therefore, should narrowly construe such purposes. Plymack v. Copley Pharmaceuticals, Inc., 93-cv-2655, 1997 WL 122801, *3 (S.D.N.Y. March 17, 1997) (citing Trebor Sportswear

Co. v. The Limited Stores, Inc., 865 F.2d 506, 510 (2d Cir. 1989)). “[T]he court must still weight, under Fed. R. Evid. 403, [the] probative value [of the evidence of settlement] against the prejudice that would result from its admission.” Id. (quoting Alpex Computer Corp., 770 F. Supp. at 165). As discussed below in Section III, any probative value of the audio tapes is substantially outweighed by the prejudicial effect.

5. Dismissal of the Indictment is the proper remedy

In the Second Circuit, dismissal of an indictment is justified to achieve either of two objectives: to eliminate prejudice to a defendant, or to prevent prosecutorial impairment of the grand jury’s independent role. See United States v. Hogan, 712 F.2d 757, 761 (2d Cir. 1983). Extensive reliance on inadmissible evidence before a grand jury is disfavored, as prosecutors must not deceive the jurors as to the quality of the testimony that they hear. See id.

Here, given the government’s reliance on admissible evidence during the grand jury process, we submit that the quality of the testimony presented to the grand jury was tainted and dismissal is the appropriate remedy.

II. IN THE ALTERNATIVE, THE COURT SHOULD EXCLUDE THE AUDIO RECORDINGS IN THEIR ENTIRETY, AND STRIKE THOSE PARAGRAPHS FROM THE INDICTMENT

At a minimum, Rule 408 requires that the Court preclude use of the tapes at trial, and strike from the Indictment those paragraphs that pertain to the defendant’s efforts to settle the claim.

Rule 408 “embodies the strong federal policy favoring settlement of disputes by precluding the use of settlement-related materials as a means of establishing or disproving liability.” Highland Capital, 551 F. Supp. 2d at 196 (citing Tribune Co. v. Purcigliotti, No. 93-cv-7222, 1996 WL 337277, at *1 (S.D.N.Y. June 19, 1996)). Rule 408 provides “wide

protection” and covers admissions of fact made by parties during the negotiations as well as conduct associated with settlement or offer to settle. Dimino, 64 F. Supp. 2d at 161. Given the broad scope of Rule 408, the defendant submits that the audio recordings should be excluded in their entirety.

Moreover, if only those portions of the recordings that specifically embody defendant’s offer to compromise were excluded, “[t]aken to its inevitable conclusion, ... this [] would result in the admission into evidence of numerous damaging statements and admissions by [defendant]” Rosenberg, 85 F. Supp. 2d 424, 434 (rejecting plaintiff’s claim that court use “surgical precision” to parse the tapes as too narrow an interpretation of Rule 408, and holding that the Rule expressly precludes such an application and provides that evidence of conduct or statements made in compromise negotiations is not admissible).

III. THE EVIDENCE IS ALSO EXCLUDABLE PURSUANT TO RULE 403 BECAUSE ANY PROBATIVE VALUE IS SUBSTANTIALLY OUTWIGHED BY UNFAIR PREJUDICE AND CONFUSION OF THE ISSUES

We further submit that any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues and the potential to mislead the jury, and thus, the tapes must also be excluded under Fed. R. Evid. 403. See Sander v. Madison Square Garden, L.P., 525 F. Supp. 2d 364, 368 (S.D.N.Y. 2007) (noting that even if evidence is not definitively excluded by Rule 408, “like any evidence it must pass Rule 403’s test”).

The advisory committee notes to Rule 408 recognize the minimal probative value statements made in settlement have, and the possible prejudice to the offeror. See Dimino, 64 F. Supp. 2d at 161 (noting that the advisory committee notes state that a “secondary purpose of [Rule 408] is to acknowledge that statements made during settlement negotiations, as well as the

fact that settlement was proposed or consummated, may be prejudicial towards the settler while holding little probative value”).

The admission of these audio recordings would lead to unfair prejudice because, under the circumstances present here, it would be wrong to permit a jury to infer guilt from the defendant’s silence in the face of accusations of fraud. Although the defendant assumes responsibility for the debt, to the extent the Bensusans claim that the defendant fraudulently obtained the funds violated agreed-upon restrictions on the use of the funds, the defendant never addresses these claims, focusing instead on his efforts at repayment. Yet, the danger is great that a jury will infer from the defendant’s refusal to respond to allegations of false promises that he is admitting to the alleged fraud as well. See Alpex, 770 F. Supp. at 167-8 (excluding compromise evidence given great danger of prejudice and likelihood that jury would accord it substantial weight, and finding that jury would not limit its consideration of the evidence and would likely use it for the improper purpose of gauging the worth of plaintiff’s claim); see also United States v. Hays, 872 F.2d 582, 589 (5th Cir. 1989) (noting that impact of evidence of a settlement with regard to a determination of liability is profound, and stating that “[i]t does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendant had done nothing wrong, they would not have paid the money back”).

Whatever probative value might ordinarily arise from a defendant’s failure to immediately rebut, allegations of wrongdoing is further diminished here because the defendant acted as he did in reliance upon instructions from his attorney, Wayne Peters.

In contrast, great prejudice is likely to result. The allegations of fraud were made by Danny Bensusan: (i) after the defendant assumed responsibility for the debt; (ii) in the midst of settlement negotiations; and (iii) when Bensusan alone knew the conversation was being

recorded. As discussed above, when accused of fraud, the defendant simply responds that he is going to get Danny 100% of the money. United States v. Park, No. CR 08-00220, 2008 WL 2338298, at *6 (C.D. Cali. May 27, 2008) (“Statements or admissions made in an offer of compromise will not be admissible as substantive evidence in the case to prove or disprove liability, because the party to whom the statement is attributable may be motivated by a desire for peace rather than from any concession of weakness of position.”). Moreover, the recordings took place well after the transfers in question were made. However, a jury is likely to view these non-contemporaneous statements as reflecting on defendant’s conduct at the time he obtained the money. See id. at *7 (excluding evidence of settlement under Rule 403 where probative value was substantially outweighed by confusion of the issues where the settlement statements were not a contemporaneous declaration of the motivation in making the loan and therefore, was only indirectly probative of material facts, and any limiting instruction by the judge might further lead to jury confusion); United States v. Roti, 484 F.3d 934, 936 (7th Cir. 2007) (affirming district court’s exclusion of settlement evidence under Rule 403 because “settlement of a claim does not imply anything helpful about [defendant’s] state of mind”).

Accordingly, we ask that the Court the court exclude use of the audio tapes at trial, and strike any reference to the settlement negotiations from the indictment (¶¶ 14-16), pursuant to Rule 403.⁹

⁹ Should the Court deny the defendant’s motion, we respectfully reserve the right to make any objections at trial to the introduction of particular statements or phrases on the audio recordings, as well as request a limiting instruction to the jury.

CONCLUSION

For the foregoing reasons, defendant respectfully submits that this Court dismiss the indictment, or in the alternative, preclude use of the audio recordings as evidence.

Dated: New York, New York
August 28, 2009

Respectfully submitted,

SERCARZ AND RIOPELLE, LLP

By: _____ /S/ _____

Maurice H. Sercarz
Diane Ferrone
152 West 57th Street, 24th Fl.
New York, New York 10019
Telephone: (212) 586-4900
Email: msercarz@sercarzandriopelle.com
Attorneys for the Defendant

TABLE OF CONTENTS

STATEMENT OF FACTS

Background.....	1
The Allegations In The Indictment.....	1
The Recorded Conversations Capture Attempts To Resolve The Dispute.....	3
Related Proceedings.....	5
The Recorded Conversations Were Utilized In The Grand Jury	5

ARGUMENT

I. THE INDICTMENT MUST BE DISMISSED AS IT WAS OBTAINED IN RELIANCE ON INADMISSIBLE EVIDENCE	6
A. The Audio Recordings Are Statements Made In Compromise Negotiations And Therefore, Are Inadmissible Evidence Pursuant To Fed. R. Evid. 408.....	6
1. The recorded conversations occurred during an actual dispute	9
2. The recorded statements capture negotiations to resolve the disputed claims.....	11
a. the Bensusans’ demands for money.....	12
b. discussions regarding the defendant’s efforts to liquidate assets	14
c. the promissory note.....	15
3. The recorded conversations were utilized in the grand jury to prove the validity of the claim, and defendant’s involvement in a fraudulent scheme	16
4. None of the “permitted uses” are applicable in the instant case	16
5. Dismissal of the Indictment is the proper remedy	17
II. IN THE ALTERNATIVE, THE COURT SHOULD EXCLUDE THE AUDIO RECORDINGS IN THEIR ENTIRETY, AND STRIKE THOSE PARAGRAPHS FROM THE INDICTMENT	17
III. THE EVIDENCE IS ALSO EXCLUDABLE PURSUANT TO RULE 403 BECAUSE ANY PROBATIVE VALUE IS SUBSTANTIALLY OUTWIGHED BY UNFAIR PREJUDICE AND CONFUSION OF THE ISSUES.....	18
CONCLUSION	21

TABLE OF AUTHORITIES

CASES

Alpex Computer Corp. v. Nintendo Co., 770 F. Supp. 161 (S.D.N.Y. 1991) 10, 17, 19

Commodity Futures Trading Commission v. Murray Ira Rosenberg,
85 F. Supp. 2d 424 (D.N.J. 2000) 11, 13, 15

Dimino v. New York City Transit Auth., 64 F. Supp. 2d 136 (E.D.N.Y. 1999) 7, 8, 18

Duse v. IBM, 748 F. Supp. 956 (D. Conn. 1990) 10

Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81 (S.D.N.Y. 1995)..... 9

Highland Capital Management, L.P. v. Schneider, 551 F. Supp. 2d 173 (S.D.N.Y. 2008).... 15, 17

Olin Corp. v. Insurance Co. of North America., 603 F. Supp. 445 (S.D.N.Y. 1985)..... 11

S & S Tobacco & Candy Co., Inc. v. Stop & Shop Companies, Inc., Nos. 95 Civ. 9263
and 95 Civ. 9265, 1997 WL 35327, 107 F.3d 4 (2d Cir. Jan. 30, 1997) 10

Sander v. Madison Square Garden, L.P., 525 F. Supp. 2d 364 (S.D.N.Y. 2007)..... 18

United States v. Arias, 431 F.3d 1327 (11th Cir. 2005) 8

United States v. Bailey, 327 F.3d 1131 (10th Cir. 2003)..... 8

United States v. Bein, 728 F.2d 107 (2d Cir. 1984) 9

United States v. Hays, 872 F.2d 582 (5th Cir. 1989)..... 8, 19

United States v. Park, No. CR 08-00220, 2008 WL 2338298 (C.D. Cali. May 27, 2008)..... 20

United States v. Roti, 484 F.3d 934 (7th Cir. 2007) 20

United States v. Stein, 05-cr-0888, 2007 WL 3009650 (S.D.N.Y. Oct. 15, 2007).....7

FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 403 2, 20

Fed. R. Evid. 408 1, 6, 16

OTHER SOURCES

Weinstein’s Federal Evidence §§ 408.02, 408.06, 408.05 8, 11