WK:MEB/SCJ/PTH
F. #2014R00437

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

Docket No. 14–CR–399 (S-1) (ENV)

ABRAXIS DISCALA, et al.,

Defendants.

– –X

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT KYLEEN CANE'S MOTION IN LIMINE TO ADMIT CERTAIN HEARSAY STATEMENTS

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PRELIMINARY STATEMENT

Defendant Kyleen Cane has moved in limine to admit a series of recorded phone calls and text messages that are hearsay statements, including: (1) seven intercepted telephone conversations involving co-defendant Abraxis Discala and certain uncharged co-conspirators whom the government does not presently intend to call as witnesses; and (2) 15 text messages from May 23, 2014, between Discala and co-conspirators Marc Wexler and Victor Azrak. (ECF No. 426, "Cane MIL"). The defendant contends that these hearsay statements should be admitted under: (1) Federal Rule of Evidence 106 to complete the story of the calls and text messages the government will seek to admit at trial; (2) Rule 806 to impeach the testimony of the government's witnesses; and (3) Rule 807's residual exception. Co-defendant Discala has filed a brief largely opposing the Cane MIL. (ECF No. 443, "Discala Opp.").

For the reasons explained further below, the defendant Cane's motion in limine seeks to admit hearsay and should be denied. It is well-settled that the Rule 106's completeness doctrine does not permit a defendant to admit otherwise inadmissible statements that are merely explanatory of her theory of the case. Additionally, the defendant's claim that the evidence is admissible under Rule 806 is a red herring; the defendant is not seeking to impeach the credibility of the government's witnesses; she is instead seeking to explain her alternate theory of the case. Indeed, with respect to the phone calls at issue, the government does not presently intend to call as witnesses any of the co-conspirators captured in the recordings the defendant seeks to introduce. Finally, the defendant's claim that these self-serving hearsay statements are admissible under Rule 807 would effectively eviscerate the hearsay rule from the Federal Rules of Evidence, and should be rejected as well.

Accordingly, the government respectfully submits that defendant's motion in limine should be denied in its entirety.

BACKGROUND

I. The Government's Case

The government's case against Abraxas J. Discala, Craig Josephberg, Kyleen Cane and Michael Morris (the "Defendants") arises out of the Federal Bureau of Investigation's ("FBI") investigation into a scheme to manipulate trading in four microcap stocks between approximately October 2012 and July 2014: (1) CodeSmart Holdings, Inc. ("CodeSmart"); (2) Cubed, Inc. ("Cubed"); (3) StarStream Entertainment ("StarStream"); and (4) The Staffing Group, Ltd. ("Staffing Group") (collectively, the "Manipulated Public Companies").

On July 15, 2014, a federal grand jury sitting in the Eastern District of New York returned an indictment charging the following seven individuals with conspiracy to commit securities fraud, conspiracy to commit mail and wire fraud and related charges: Discala, Josephberg, Cane, Marc Wexler, Ira Shapiro, Matthew Bell and Victor Azrak (the "Indictment"). (ECF No. 1).

On November 2, 2015, a grand jury returned a Superseding Indictment, which added three additional defendants, Morris, Darren Goodrich and Darren Ofsink; additional factual allegations; and an additional wire fraud count (the "Superseding Indictment" or "S-1 Ind.").[1] (ECF No. 166).

As alleged in the Superseding Indictment, between approximately October 2012 and July 2014, the Defendants engaged in a scheme to defraud investors and potential investors in the Manipulated Public Companies by: (1) issuing false and misleading press releases; (2) making false and misleading SEC filings; (3) fraudulently concealing the defendants' and their co-

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[1] The Superseding Indictment did not charge Wexler, Bell, or Azrak, who had already pleaded guilty to charges related to the Indictment.

conspirators' beneficial ownership of stock; (4) engineering price movements and trading volume in the stocks; and (5) making unauthorized purchases of the stock in accounts of unwitting investors. (S-1 Ind. ¶ 18).

The defendant was an attorney and the managing partner of the law firm Cane Clark LLP. (S-1 Ind. ¶ 5). Cane Clark purportedly specialized in providing corporate and securities fraud legal services to public companies with small capitalizations. (Id.).

II. The Judicially-Authorized Wiretap

Part of the government's investigation included a judically-authorized wiretap. Specifically, on or about and between May 2, 2014 and June 29, 2014, law enforcement authorities conducted a judicially-authorized wiretap of Discala's cellular telephone (the "Discala Wiretap"). (S-1 Ind. ¶ 37). The Discala Wiretap revealed that the Cubed Co-Conspirators used wash trades and matched trades to manipulate Cubed's stock price and volume. (Id.). Specific intercepted calls relating to the scheme are described in paragraphs 39, 41, 53(e)-(n) and 60 of the Superseding Indictment. Rather than generating significant market interest and causing a quick pump and dump that would invite regulators' scrutiny, the Cubed Co-Conspirators engaged in a scheme that gradually increased the price of Cubed's stock to provide the false appearance of a legitimate company with genuine and steady market demand for the security. (Id. ¶ 38).

To successfully execute their fraudulent scheme to cause a controlled rise of Cubed's stock, the Co-Conspirators used escrow accounts that were maintained by Cane to manipulate the price and trading volume of Cubed's stock. (S-1 Ind. ¶ 39).

On July 9, 2014, when trading was halted by the SEC, Cubed's stock price closed at $6.60 per share and remained in the controlled pump phase of the fraudulent manipulation scheme orchestrated by the Cubed Co-Conspirators. (S-1 Ind. ¶ 42).

III. Defendant Cane's Motion In Limine

On January 3, 2018, defendant Cane filed the instant motion in limine seeking to admit seven intercepted telephone call recordings identified in Exhibit A to her motion. The recordings all involve co-defendant Discala and another speaker, and are summarized as follows: (1) a May 6, 2014 call between Discala and undicted co-conspirator regarding the issuance of press releases for Cubed; (2) a May 7, 2014 call between Discala and an undicted co-conspirator associated with Cubed; (3) a May 8, 2014 call between Discala and an investor where there is some discussion of the escrow account established by Cane; (4) a May 8, 2014 call between Cane and an undicted co-conspirator associated with Cubed; (5) a May 8, 2014 call between Cane and an investor in Cubed where there is mention of a participation agreement; (6) a June 3, 2014 call between Discala and broker regarding Cubed; and (7) a June 6, 2014 call between Cane and an individual associated with Scanbuy.

In addition, the defendant seeks to admit 15 text messages set out in Exhibit B to Cane's motion, from May 23, 2014, involving Discala, Wexler and Azrak. On that day, the price of Cubed rose significantly, and during a recorded call marked as Government Exhibit 198-28, Cane and Discala spoke about the price of the stock and Cane indicated that they needed to get the price back down. A copy of the government's transcript for that call, Government Exhibit 198-28T,[2] is attached hereto as Exhibit A.[3] The defendant seeks to admit these text messages because

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[2] The government does not intend to introduce Government's Exhibit 198-28T, but intends to use it as an aid to the jury while the call is played.

[3] Paragraph 41 of the Superseding Indictment describes that call, and three others that took place that day: "During four telephone calls that day, May 23, 2014, the defendant ABRAXAS J. DISCALA's . . . control of the price of Cubed's stock is apparent. During a telephone call that morning, DISCALA and the defendant KYLEEN CANE discussed the jump in Cubed's price to $7 per share, and CANE stated, in part, 'We need to keep it back

she contends that they show that Wexler and Azrak were "exultant at the spike in the price of Cubed stock on the morning of May 23, 2014," which Cane asserts is "utterly inconsistent with Cane's view on May 23, 2014 . . . . expressed later in the day on a tape-recorded phone call marked as Government Exhibit 198-28." (Discala MIL at 8).

ARGUMENT

I. Rules 106, 806 and 807 Do Not Support Admission of These Calls and Text Messages

A. Legal Standard

1. Rule 106

Federal Rule of Evidence ("FRE") 106, also known as the "rule of completeness," states that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." FRE 106. "The doctrine of completeness, Fed.R.Evid. 106, does not compel admission of otherwise inadmissible hearsay evidence." U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1375–76 (2d Cir. 1988); see United States v. Terry, 702 F.2d 299, 314 (2d Cir. 1983) ("Rule 106 does not render admissible evidence that is otherwise inadmissible."). Rather, a defendant must demonstrate that the omitted portion of the hearsay statement is "necessary to explain the admitted portion, to place

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down now. We need to keep it back down.' Later that day, during a telephone call between DISCALA and Co-Conspirator 2, DISCALA stated, in part, 'I talked to Kyleen [CANE], and we, we don't want this. We would want 6.35 today, 6.30, something like that, and then let, let news rip it next week.' DISCALA also called Co-Conspirator 3, a corrupt investor whose identity is known to the Grand Jury, to explain the trading in Cubed's share price, and stated, in part, 'Yeah like…it just looks stupid! It went up, and up, and then it came back, you know – it's like, look, if we ended at 6.30, we're good. I wanna bring it back up to 6.55; 6.55 on Tuesday, which I can, with some news, right? And just keep stepping it.' Finally, during a telephone call with the defendant DARREN GOODRICH, DISCALA stated, 'So Kyleen's [CANE] re-tweaking this thing to 6.35, I just wanted to let you know.'" (S-1 Ind. ¶ 41).

the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion." United States v. Johnson, 507 F.3d 793, 796 (2d Cir. 2007) (internal quotations and citations omitted); see also United States v. Jackson, 180 F.3d 55, 73 (2d Cir. 1999) (affirming district court's decision to admit only 90-seconds of forty-two minute tape that the government offered as inculpatory evidence; "The completeness doctrine does not, however, require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages.") (citations omitted).

As the Tenth Circuit recently stated, the rule of completeness "does not give an interview declarant a general right to introduce selected statements to try to counter the statements in the proponent's offered segment." United States v. Williston, 862 F.3d 1023, 1038 (10th Cir. 2017). Similarly, statements that "offer[] an alternative theory of the evidence" are not "necessary to clarify or explain" a defendant's statements about the charged crimes. United States v. Blake, 195 F. Supp. 3d 605, 610-11 (S.D.N.Y. 2016); see also United States v. Lewis, 641 F.3d 773, 786 (7th Cir. 2011) (affirming district court's denial of admission of portion of statement defendant sought to admit on completeness grounds; what defendant sought to admit "was merely explanatory of his theory of the case.").

2. Rule 806

Federal Rule of Evidence 806 states that, after a hearsay statement or a statement under 801(d)(2)(C), (D), or (E) has been admitted, "the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct . . . ." Evidence is admissible pursuant to Rule 806, however, only to "show[] that the declarant made inconsistent statements." United States v. Trzaska, 111 F.3d 1019, 1024 (2d Cir.

1997) (declining to admit statement pursuant to FRE 806 because the proffered statements "are not inconsistent"); see United States v. Persico, No. 04-CR-911 (SJ), 2006 WL 3246922 (E.D.N.Y. Nov. 8, 2006) (denying admission of four telephone calls by defendant offered on Rule 806 grounds; the court found that the calls did not "actually contain impeachment material" against the declarant).

3. Rule 807

Rule 807, the Residual Exception to the hearsay rule, permits the admission of certain otherwise hearsay statements if: "(1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) is offered of evidence of a material fact; (3) it is more porbative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; (4) admitting it will best serve the purposes of these rules and the interests of justice." To qualify for admission under this exception, "the evidence must . . . fulfill five requirements: trustworthiness, materiality, probative importance, the interests of justice and notice." Schering Corp. v. Pfizer, Inc., 189 F.3d 218, 231 (2d Cir. 1999). These standards "independently ensure that the rule will 'be used very rarely, and only in exceptional circumstances.'" Id. at 232 (quoting S. Rep. No. 93-1277, at 36 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7062).

B. Application

The government's case-in-chief will include a number of intercepted phone calls from the Discala Wiretap and text messages involving Discala, Cane and other co-conspirators related to the charged fraud conspiracy. Those phone calls and text messages are not hearsay when the government offers them, because they represent admissions by a party opponent, or admissions by a party opponent's co-conspirator, and thus are admissible under FRE 801(d)(2)(A) and (E). The defendant, however, cannot use the party opponent exemption, or the co-conspirator exemption from the hearsay rule to offer otherwise inadmissible out-of-court statements on her behalf at trial.

Instead, first, the defendant seeks their admission under FRE 106, the "rule of completeness." But the calls and text messages the defendant seeks to introduce are not portions of the calls and text messages the government seeks to introduce. They are wholly separate calls and text messages, and the defendant seeks instead to introduce them to provide her theory of the evidence. As detailed above, FRE 106 has a very circumscribed purpose: to ensure that when the government seeks to introduce a portion of a defendant's statement, related statements that are "necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion" are not omitted. Johnson, 507 F.3d at 796. However, the rule "does not render admissible evidence that is otherwise admissible," Terry, 702 F.2d at 314; cannot be used as a "mechanism to bypass hearsay rules" to admit a defendant's self-serving or exculpatory statement, Gonzalez, 399 Fed. Appx. at 645; and "does not [] require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages," Jackson, 180 F.3d at 73.[4]

Second, the defendant seeks admission of these calls and text messages under Rule 806. Rule 806 does not apply here, however, because the statements that the defendant intends to seek to admit are not designed to"attack[]" the declarant's credibility. In fact, the government does not presently intend to call any of the individuals in the seven phone calls offered by the

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[4] The Rule 106 cases cited by the defendant do not support her motion. For example, the defendant's reliance on Jackson (Cane MIL at 4) is misplaced. In that case, the Second Circuit affirmed the district court's decision denying the defendant's admission of portions of a tape containing the defendant's "self-serving statements" which were hearsay. Jackson, 180 F.3d at 74.

defendan, and the defendant has not made clear how the proffered calls impeaches any evidence that will be admitted with respect to those declarants. Indeed, the defendant seeks to admit these phone calls and text messages in order establish her alternate theory of the evidence. For example, the defendant frankly admits that she seeks to admit the May 23, 2014 text messages because she believes that they show that Wexler and Azrak were "exultant at the spike in the price of Cubed stock on the morning of May 23, 2014," which Cane asserts is "utterly inconsistent with Cane's view on May 23, 2014 . . . . expressed later in the day on a tape-recorded phone call marked as Government Exhibit 198-28." (Discala MIL at 8). Cane's argument that Wexler and Azrak's text messages are inconsistent with Cane's view at the time does not make the text messages admissible, and the statements do not attack Wexler and Azrak's credibility. Thus, Rule 806 is not applicable here. See Trzaska, 111 F.3d at 1024 (declining to admit statement pursuant to FRE 806 because the proffered statements were not inconsistent).[5]

Third, the defendant seeks admission of these calls and text messages under Rule 807. It does not apply here either. Cane has failed to make a showing that the seven telephone calls and 15 text messages are offered as evidence of a material fact, that they are more probative than other evidence that the defendant can obtain, or that admitting the statements will serve the interests of justice. This is not one of the rare and exceptional circumstances in which Rule 807 would apply. Indeed, it appears to be nothing more than an attempt to execute an end run around the hearsay rule. Accordingly, the recorded telephone calls and text messages specified by the defendant should not be admitted under Rule 807.

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[5] The cases cited by defendant regarding Rule 806 do not support her motion. (Cane MIL at 9). Indeed, the cases cited by the defendant involve situations where a declarant's statement was admitted to impeach that declarant. Here, as explained in text, the defendant seeks to admit hearsay statements in order to explain her theory of the case.

CONCLUSION

For the reasons stated herein, the government respectfully submits that defendant Cane's first motion in limine should be denied in its entirety.

Dated: Brooklyn, New York
January 9, 2018

Respectfully submitted,

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