UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- v. - :

S14 98 Cr. 1023 (LAK)

SULAIMAN ABU GHAYTH, :
a/k/a "Suleiman Abu Gayth,"

:

Defendant.

:

- x

GOVERNMENT'S OPPOSITION TO THE DEFENDANT'S MOTION IN LIMINE TO ADMIT THE DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT WITHOUT MODIFICATION

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SULAIMAN ABU GHAYTH, :
a/k/a "Salman Abu Ghayth,"

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The Government respectfully submits this memorandum of law in opposition to the Motion in Limine to Admit the Defendant's Statement to Law Enforcement Without Modification ("Deft. Mot."), which was filed earlier today by defendant Sulaiman Abu Ghayth ("the defendant" or "Abu Ghayth"). By that motion, the defendant makes the legally indefensible request for wholesale admission of his post-arrest statement to Federal Bureau of Investigation Special Agent Michael Butsch. This request has absolutely no basis in the Federal Rules of Evidence or any other legal authority, and would fly in the face of firmly-established hearsay rules. *See United States* v. *Marin*, 669 F.2d 73, 84 (2d Cir. 1982) ("When the defendant seeks to introduce his own prior statement for the truth of the matter asserted, it is hearsay, and it is not admissible."). Accordingly, the motion should be denied.

Through Special Agent Butsch, the Government intends to offer testimony regarding portions of the defendant's post-arrest, *Mirandized* statement. The Government does not intend to offer the defendant's post-arrest statement "in piecemeal fashion," Deft. Mot. at 7, or in any manner that would be misleading to the jury. Rather, with respect to the portions of the statement that the Government plans to offer, the Government intends to elicit those portions in

their entirety to ensure a fair understanding of each portion. The defense should not be allowed to question Special Agent Butsch on cross-examination about other portions of the defendant's post-arrest statement that are neither explanatory nor relevant to the admitted portions, particularly the defendant's self-serving statements and his discussion of irrelevant matters.[1]

The defense makes the curious and unsupported assertion that "[t]he prohibition against hearsay is inoperative." Deft. Br. at 8. The rules governing hearsay testimony are, of course, very much operative at this trial. When offered by the Government, Abu Ghayth's prior statements, including his post-arrest statement, are non-hearsay admissions of a party opponent. *See* Fed. R. Evid. 801(d)(2)(A). When offered by Abu Ghayth, however, his own statements are inadmissible hearsay. *Id*. 801(c), 802; *e.g.*, *United States* v. *Kadir*, 718 F.3d 115, 124 (2d Cir.) ("A defendant may not introduce his own prior out-of-court statements because they are hearsay, and not admissible." (internal quotation marks and ellipsis omitted)), *cert. denied*, 134 S. Ct. 160 (2013). And of course, a defendant's "own self-serving statements . . . as offered by him, are inadmissible hearsay." *United States* v. *Jackson*, 180 F.3d 55, 73 (2d Cir. 1999); *see Marin*, 669 F.2d at 84 ("When the defendant seeks to introduce his own prior statement for the truth of the matter asserted, it is hearsay, and it is not admissible.").

[1] As directed by the Court on Tuesday, March 11, 2014, the parties discussed Special Agent Butsch's testimony and resolved one disputed issue. The Government plans to elicit from Special Agent Butsch that Abu Ghayth stated that he was arrested in Iran in 2003, along with senior al Qaeda figures Saif al-Adel, Abu Mohammed al-Masri, and Abu Khayr al-Masri, who already have been the subject of testimony at this trial. The Government does not plan to elicit any further evidence about the arrest or evidence whatsoever regarding Abu Ghayth's confinement in Iran. The defense has represented to the Government that it does not intend to seek to introduce any evidence regarding Abu Ghayth's or his conditions of confinement in Iran. To be sure, there is no basis for admitting such evidence, as neither Rule 106, nor Rule 401, nor Rule 403 supports the admission of any evidence about the defendant's statements about his time in Iran.

Federal Rule of Evidence 106, commonly known as the "rule of completeness," in no way changes this analysis. Rule 106 provides, "If 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." Thus, "even though a statement may be hearsay, an omitted portion of the statement must be placed in evidence if 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." *United States* v. *Coplan*, 703 F.3d 46, 85 (2d Cir. 2012) (internal quotation marks omitted); *see also* Fed. R. Evid. 106 advisory committee's note (explaining that Rule 106 is grounded in two considerations: (1) "the misleading impression created by taking matters out of context"; and (2) "the inadequacy of repair work when delayed to a point later in the trial").

The Second Circuit and this Court have made clear that the rule of completeness does not, however, compel the admission of otherwise inadmissible hearsay testimony. *See Chevron Corp*. v. *Donziger*, No. 11 Civ. 0691 (LAK), 2014 WL 816086, *16 (S.D.N.Y. Mar. 4, 2014) (citing *Phoenix Assocs. III* v. *Stone*, 60 F.3d 95 (2d Cir. 1995); *United States Football League* v. *National Football League*, 842 F.2d 1335 (2d Cir. 1988)); *see Coplan*, 703 F.3d at 85 (the rule of completeness '"does not . . . require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages'" (quoting *United States* v. *Kopp*, 562 F.3d 141, 144 (2d Cir. 2009)); *Marin*, 669 F.2d at 84. Nor is the rule of completeness a "a mechanism to bypass hearsay rules for any self-serving testimony." *United States* v. *Gonzalez*, 399 Fed. Appx. 641, 645 (2d Cir. 2010). A defendant bears the burden of demonstrating that the portions of the statement he seeks to offer are necessary to clarify or explain the portions the Government

has offered. *See United States* v. *Glover*, 101 F.3d 1183, 1190 (7th Cir. 1996) ("[T]he proponent of the additional evidence sought to be admitted must demonstrate its relevance to the issues in the case, and must show that it clarifies or explains the portions offered by the opponent."). The defense has not even made an effort to meet that burden here.

To be sure, courts in this Circuit have repeatedly rejected rule of completeness arguments in analogous situations to this case. In *United States* v. *Johnson*, 507 F.3d 793 (2d Cir. 2007), for example, the Second Circuit affirmed the district court's admission of portions of the defendant's post-arrest statements by the Government, concluding that the two parts of that statement were appropriately divided. The Second Circuit concluded that the district court did not abuse its discretion in admitting a redacted version of the defendant's confession, because "the redacted portion did not explain the admitted portion or place the admitted portion in context." *Id.* at 796. In reaching this holding, the Second Circuit in *Johnson* reiterated the principle that the rule of completeness "'does not . . . require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages.'" *Id.* (quoting *United States* v. *Jackson*, 180 F.3d 55, 73 (2d Cir. 1999)); *see Jackson*, 180 F.3d at 73 (admitting only 90 seconds of a 42 minute recorded conversation between the defendant and a third party); *United States* v. *Lesniewski*, No. 11 Cr. 1091 (VM), 2013 WL 3776235, **4-5 (S.D.N.Y. July 12, 2013) (refusing to admit certain portions of the defendant's prior statements under Rule 106 based on mere proximity of those statements to admitted portions).

Lastly, the defense's blanket and conclusory statement that "[f]airness requires" the admission of the entirety of the defendant's post-arrest statement not only lacks legal authority, but would require the Court to ignore the Federal Rules of Evidence at trial. *See United States* v. *Bifield*, 702 F.2d 342, 350 (2d Cir. 1983) ("a defendant's right to present a full defense and to

receive a fair trial does not entitle him to place before the jury evidence normally inadmissible" (citing *United States* v. *Corr*, 543 F.2d 1042, 1051-52 (2d Cir. 1976)). The Sixth Amendment "does not guarantee the right to unlimited cross-examination," *United States* v. *Payne*, 99 F.3d 1273, 1281 (5th Cir. 1996), and it "does not give criminal defendants carte blanche to circumvent the rules of evidence," *United States* v. *Almonte*, 956 F.2d 27, 30 (2d Cir. 1992); *see Rock* v. *Arkansas*, 483 U.S. 44, 55 n.11 (1987) ("[N]umerous . . . procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify." (citations omitted)).[2]

Thus, as is the common practice in this District, it is entirely permissible for the Government to introduce certain portions of the defendant's post-arrest statement, as statements of a party opponent, and the defendant should be precluded from introducing his own self-serving post-arrest statement.

[2] The defense's reliance in Court and in his brief on *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), is particularly misplaced. *See* Deft. Br. at 6. There, the defendant was denied the right to cross-examine a witness who had admitted to the murder the defendant was charged with, and to introduce testimony from individuals to whom that witness had confessed. *Id*. at 291-92. The Supreme Court reversed the defendant's conviction, based on the cumulative effect of the trial court's denial of critical evidence. *Id*. at 302-03. *Chambers* is plainly inapposite here. Whereas the defendant in *Chambers* sought to introduce specific and narrow evidence of another individual's confession, Abu Ghayth seeks to admit self-serving or irrelevant statements that are expressly barred under the Federal Rules of Evidence. Further, unlike *Chambers*, where the defendant was completely prevented from cross examining the witness on the "damning repudiation" of his admission, *id*. at 295, Abu Ghayth has every ability to cross-examine Special Agent Butsch on the relevant post-arrest statements that will be offered into evidence. Finally, unlike in *Chambers*, the defendant of course has the opportunity to testify and, assuming relevance, offer the very testimony he seeks to admit.

For the reasons set forth above, the Court should deny the defendant's Motion in Limine to Admit Defendant's Statement to Law Enforcement Without Modification.

Dated: New York, New York
March 12, 2014

Respectfully submitted,

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AFFIRMATION OF SERVICE

JOHN P. CRONAN, pursuant to 28 U.S.C. § 1746, hereby declares under the penalty of perjury:

I am an Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York. On March 12, 2014, I caused copies of the foregoing Government's Opposition to the Defendant's Motion in Limine to Admit the Defendant's Statement to Law Enforcement Without Modification, to be delivered by ECF and email to:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: New York, New York
March 12, 2014

___/s/ John P. Cronan_____
JOHN P. CRONAN
Assistant United States Attorney