IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA *v.* TELDRIN FOSTER AND CARLA JACKSON	Criminal Action No. 1:20-CR-296-JPB

United States' Reply in Support of Motion to Admit Evidence of Co-Defendants' Guilty Pleas

The United States of America, by Ryan K. Buchanan, United States Attorney for the Norhern District of Georgia, and Tal C. Chaiken and Samir Kaushal, Assistant United States Attorneys, and by Glenn S. Leon, Chief of the Fraud Section, and Siji Moore, Trial Attorney, respectfully files this Reply in Support of its Motion to Admit Evidence of Co-Defendants' Guilty Pleas.

Defendant Teldrin Foster's response fails to show that guilty plea evidence should not be admitted.[1]

First, Foster has opened the door to the admission of guilty plea evidence. Foster does not dispute that his defense was based on propensity evidence that co-defendant Darrell Thomas is a liar who uses other people's names without their permission and falsely inculpates people, and therefore must have done the same as to Foster. (*But see* Doc. 914 at 9

[1] Because Foster is still cross-examining the Special Agent, additional grounds to admit evidence of the co-defendants' guilty pleas could arise.

(Foster presenting a new defense theory based on propensity evidence: "Mr. Foster will argue that Darrell Thomas is someone who used deceit[.]").) Foster also does not dispute that:

- He elicited testimony that 24 individuals were charged in connection with this case, despite that fact having no bearing on any fact the jury must find at trial.[2]
- He elicited testimony about Brenda Miller, an individual who is not charged and has nothing to do with the fraudulent PPP loans, for the purpose of supporting the "uses other people's names / falsely inculpates others" *modus operandi* argument.
- He elicited testimony that certain co-defendants had not communicated with Thomas, giving the jury the false impression that they were falsely inculpated by Thomas or that their names were used without their knowledge, like Brenda Miller.

After having raised the inference that Thomas falsely implicated codefendants, Foster now promises to not "argue that Thomas falsely implicated the codefendants who have pled guilty." (Doc. 914 at 9.) But the damage is already done. And an after-the-fact promise to not further pursue improper argument does not reverse what has already occurred. After putting the guilt and innocence of co-defendants at issue, Foster argues that the United States should be precluded from presenting key evidence that closes the doors he opened: the fact of guilty pleas by

[2] Foster chose to do so despite the United States' motion *in limine* setting forth the law on the matter. (See Doc. 796.)

codefendants, which is evidence that Thomas did not use any charged co-defendants' names in the PPP schemes without their permission.

"Inadmissible extrinsic evidence is admissible on redirect as rebuttal evidence, when defense counsel has opened the door to such evidence during cross-examination." *United States v. Cooper*, 926 F.3d 718, 730 (11th Cir. 2019) (internal quotation marks omitted). "The district court has broad discretion in admitting rebuttal evidence." *United States v. Hawkins*, 905 F.2d 1489, 1496 (11th Cir. 1990). Rebuttal evidence is testimony used "to explain, repel, counteract, or disprove the evidence of the Adverse party" such that "if the defendant opens the door to the line of testimony, he cannot successfully object to the prosecution 'accepting the challenge and attempting to rebut the proposition asserted.'" *United States v. Delk*, 586 F.2d 513, 515–16 (5th Cir. 1978) (quoting *Luttrell v. United States*, 320 F.2d 462, 464 (5th Cir. 1963)); *United States v. Ouedraogo*, 824 F. App'x 714, 723 (11th Cir. 2020). There is no error allowing evidence on rebuttal simply because it would have been impermissible to introduce that evidence during the government's case-in-chief. *Delk*, 586 F.2d at 519.

Second, the admission of information, through testimony or judicial notice, related to a court record—here, that guilty pleas were entered on the docket for certain co-defendants—is not something that requires testimony from a co-defendant. *Zuniga v. Felker*, 458 F. App'x 693, 693–94 (9th Cir. 2011) (determining that there was no violation of the Confrontation Clause where "clerk's records of . . . co-defendants' guilty pleas" were entered into evidence because such records are nontestimonial); *United States v. Kuai Li*, 280 F. App'x 267, 269 (4th Cir. 2008) (stating defendant's Confrontation Clause right was not violated when the district court took judicial notice of guilty plea entered by official who assisted defendant).

Foster concedes this point in discussing Brenda Miller. He states that "[i]f the government had a plea agreement from Brenda Miller that established that she was an active participate [sic] in Bellator Phront Group, the government could admit that." (Doc. 914 at 9.) Brenda Miller is not a witness in this trial, yet Foster concedes that, given his questioning suggesting that her name was used without her permission, the door would be opened to admission of a guilty plea proving the opposite. The same is true for the co-defendants. To try to escape this logical conclusion, Foster asserts that his questions as to the co-defendants were "a separate line of questioning." (Doc. 914 at 8.) But juries do not consider each piece of evidence and testimony in a vacuum. Foster's questioning must be viewed in its totality, and it suggested to the jury that the names of people who have been charged were used without their permission. The United States should be permitted to rebut that suggestion with evidence of the guilty pleas.

Third, Foster's concern that he will be convicted due to guilt by association can be addressed by a limiting instruction that describes the purpose for which the guilty plea evidence is being admitted. Foster's concern that jurors would be left with the impression that "every other person that he has been charged with has pled guilty to conspiring with him, such that Mr. Foster must be guilty too" is of no moment. (Doc. 914 at 5 (emphasis omitted).) The United States is not seeking to admit evidence or testimony that any co-defendant pleaded guilty to conspiring with Foster. Rather, it seeks to admit evidence only that each co-defendant entered a guilty plea.

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