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Honorable Dennis M. Cavanaugh
United States District Judge
U.S. Post Office & Federal Courthouse
Newark, NJ 07102

Re: United States v. Paul W. Bergrin
Criminal No. 09-369

Dear Judge Cavanaugh:

We are in receipt of Mr. Sanders' letter to Your Honor of February 19, 2013 seeking to limit Mr. Bergrin's use of assertions made by the attorney for Government witness Thomas Moran in bail-related motions. The reason for the Government's motion will be obvious to the Court when it reviews the briefs at issue: Mr. Moran's bail motion sets forth facts that are completely inconsistent with his anticipated testimony. The Government agrees that Mr. Bergrin may ask Mr. Moran whether he made the statements to his attorneys that were relayed to the Court. Leaving aside that the implication of the Government's argument -- that the statements set forth in those pleadings were of the attorney's own making, without Mr. Moran's input -- is both dubious and constitutes a troubling ethical accusation against an officer of the Court who is not here to defend himself, Mr. Bergrin also respectfully submits that it is inconsistent with the caselaw. This is especially so given the nature of the factual statements set forth in those pleadings: far from mere denials, they include specific factual averments. *See, e.g.*, Bail Motion at 8 (stating, inter alia, that "no acts of violence were ever perpetrated. Moran is confident that once all of are brought to light that there will be no doubt that he ever truly contemplated even participating in a scheme of violence."); Reply Letter Brief at 2-3 (*e.g.*, "These conversations further demonstrate that Moran did not believe CI-1 [Cordova] to be a hitman. It is unfathomable that if he believed that CI-1 was a hitman, Moran would have spent time socially together in bars and public restaurants.").

To be sure, the cases cited by the Government would seem to support the prosecution's position. But upon closer examination, those cases are readily distinguishable from this case in that here, the documents that Mr. Bergrin seeks to use are pleadings duly filed in this Court, while in the cases cited by the Government, they were oral statements on the one hand, *see United States v. Cuevas Pimentel*, 815 F. Supp. 81, 83 (D. Conn. 1993) (discussing in court oral statements made at a bail hearing), or statements in a submission to the Department of Justice, on the other. *See United States v. Staudtmauer*, Criminal No. 05-429 (excerpt provided by the Government). And the law is clear: "prior pleadings may be introduced on cross examination for use as an impeachment tool under Fed. R. Evid. 613." *Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428, 1432 (10th Cir. 1990). *See also United States v. Morgan*, 376 F.3d 1002, 1007 (9th Cir. 2004) ("Once Goodman denied owing over \$100,000 to creditors, the bankruptcy petition --

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containing a prior, sworn, contradictory statement made by a party witness -- became admissible under three evidentiary rules.”) (citing, *e.g.*, Fed. R. Evid. 613); *Williams v. Union Carbide Corp.*, 790 F. 2d 552, 555-56 (6th Cir. 1986) (pleadings in a prior case may be used as evidentiary admissions); *Athridge v. Aetna Cas. & Sur. Co.*, 474 F. Supp. 2d 102, 111 (D.D.C. 2007) (“Federal Rule of Evidence 613(b) ... permits introduction of extrinsic evidence of a prior inconsistent statement of a witness ... prior pleadings are admissible in subsequent litigation on cross-examination as an impeachment tool under Rule 613 These statements may be admitted once the foundation is laid by asking [the witness] to admit or deny he made them.”); *Athridge v. Rivas*, 421 F. Supp. 2d 140, 151 (D.D.C. 2006) (“although Attorney Starr may have drafted and signed Iglesias’ answer, the statements contained therein are considered statements of Iglesias himself”) (citing *Dugan*, 915 F.2d at 1431-32).

In sum, Mr. Bergrin should be permitted to fully avail himself of these prior inconsistent statements, consistent, of course, with the proper means of questioning witnesses with regard to prior statement under the Federal Rules of Evidence. Thank you for your kind consideration of this matter.

Respectfully submitted,

s/ Lawrence S. Lustberg

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