**FORMER AGENT MCCLELLAND’S TESTIMONY WAS REPLETE WITH INADMISSIBLE EVIDENCE**

The Government’s response confirms the inadmissibility of US 237. The government must prove by a preponderance of the evidence that a statement is admissible against a defendant under Federal Rule of Evidence 801(d)(2)(E). *United States v. Bailey*, 973 F.3d 548, 560 (6th Cir. 2020). The court must make findings. *United States v. Conrad*, 507 F.3d 424, 430-32 (6th Cir. 2007). Here, there was no proof to support a conclusion that the spreadsheet was a statement of Maike. The Government relies only on the fact that the spreadsheet was on a computer that was seized from the home Maike shared with his wife. There were “several” computers seized from the home. (R. 700,#10453-54.) There was no proof that Maike used the computer from which US 237 was obtained; only speculation supported the conclusion. Moreover, there was no proof at all that Maike authored the spreadsheet. The mere presence of a spreadsheet on a computer does not support a finding that it is a statement made by a particular user of the computer. To assume that is speculation. *See Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1003 (3d Cir. 1988)(“declarations of unidentified persons are rarely admitted. This is undoubtedly due in part to the heavy burden which rests on the proponent of the evidence to satisfy evidentiary and trustworthiness requirements”); *United States v. Reilly*, 33 F.3d 1396, 1428 (3d Cir. 1994)(“Without the requisite foundational testimony from a coastal station representative, however, there simply is no admissible evidence establishing Reilly as the onshore declarant who transmitted the radiotelegram instructions to the Khian Sea. That being so, any ‘statements’ allegedly made in the radiotelegrams by Reilly, either directly or indirectly, were not admissible as non-hearsay admissions of a party-opponent.”); *Floyd v. City of Spartanburg S.C.*, No. 7:20-cv-01305-TMC, 2023 U.S. Dist. LEXIS 202176, at \*21 (D.S.C. Aug. 29, 2023)(finding spreadsheet inadmissible because “Plaintiffs have not offered evidence that could support a nonspeculative finding regarding who created the Spreadsheet.”); *Cahoon v. Shelton*, No. 07-008 ML, 2009 U.S. Dist. LEXIS 58589, at \*17 (D.R.I. June 18, 2009)(“Because the memoranda's author(s) is/are unknown, this Court finds that the documents are not admissible as admissions of a party opponent.”). There was no proof that established that US 237 was Maike’s statement.

The court also never even attempted to make a finding that the purported statement (US 237) was made in furtherance of the alleged conspiracy. “Whether a statement was in furtherance of a conspiracy turns on the context in which it was made and the intent of the declarant in making it.”   *United States v. Warman*, 578 F.3d 320, 338 (6th Cir. 2009). Statements about work previously performed are not in furtherance of a conspiracy: "[T]hese statements are simply casual conversation of how hard the nephews worked on a particular evening - and, other than the illegal nature of the work, are no different than a statement by a farmer that he harvested forty acres of wheat by sundown." *United States v. Darwich*, 337 F.3d 645, 658 (6th Cir. 2003). In*Conrad*, 507 F.3d at 431, this Court reversed a conviction where the district court failed to make findings as to the timing or the context of the statement at issue: "For all this Court knows, [co-conspirator's] statement could have been made after he was arrested and the conspiracy had ended or was mere idle chatter." (Internal citation and quotation marks omitted). A statements made *after* the conclusion of the conspiracy is not made "in furtherance of the conspiracy." *United States v. Martinez*, 430 F.3d 317, 327 (6th Cir. 2005). Because the court never attempted to make a finding there was no consideration (or proof) of the context of the spreadsheet or the timing of its creation. The spreadsheet also related solely to past events; the Government contends it showed Emperors and their enrollment dates. There was no proof or finding that the purported statement was in furtherance of the conspiracy.

The Government contends that US 237 was a statement in furtherance of the conspiracy because it indicates that entities associated with Hosseinipour were Emperors and
"[s]tatements identifying other conspirators and their roles in the conspiracy further the conspiracy.” (Gov’t Br.82.) But the alleged conspiracy involved the fraudulent sale of Emperor packages; identifying Hosseinipour as a recipient of a Emperor package did not identify her alleged role in the alleged conspiracy. It was error to admit US 237 and violated the defendants’ rights under the Confrontation Clause.

The Government used US 237 to create US Exhibits 230 and 232. The Government admits the court erred by admitting US 230 and 232. This evidence was not harmless. US 230 falsely conveyed the impression that more revenue was generated from the sale of Emperor packages than was deposited into company bank accounts. The chart was based on the false assumption that each Emperor package generated $5,000 in revenue. The Government knew this was false–many Emperor packages were given away, many purchasers of Emperor packages received refunds, and many purchasers used earned commissions for their purchases. US 230 prejudiced the defendants because it falsely suggested that they had hidden money in undisclosed bank accounts. This was irrelevant to the charges—that the defendants conspired to deceive purchasers of Emperor packages and violated Federal Rule of Evidence 404(b). The Government repeated this false narrative throughout the trial. McClalland testified that “a conclusion [he] made” was that “revenue generated from [E]mperor sales d[id] not appear to be deposited into known bank reports.” (R.700,#10501.) The Government later elicited hearsay testimony that he had “evidence from…e-mail…that there could have been or may have been other overseas bank accounts that were being used by the defendants that you were not aware of during the course of your investigation.” (*Id.* at #10504.) The Government repeated the false narrative from US 230 in closing argument: “So, again, recall David McClelland testified he was able to trace the money for the domestic bank accounts. There's a lot of money that was not traced. David McClelland shows 17 million of money that he traced in accounts….So there's a lot of unaccounted for money.” (R.671,#7702.)The impact of this evidence was reflected by a reaction the trial judge expressed during sentencing when reflecting on US 230: “And so one question I have today is: Well, where did the other $17 million go, where is it right now?” (R.663,#6529.) Government expert witness Keep also improperly relied on US 230 to advance his conclusion that I2G was a pyramid scheme. (R.487,#3875-76.)

Nor was US 232 harmless; it was severely prejudicial and based on false assumptions. It conveyed the message that almost all purchasers of Emperor packages failed to earn any “profit.” This was based on the false assumptions that every Emperor paid $5,000 per package and that all commissions earned were reflected in payments from Global Gateway Payroll. The falsity of these assumptions is addressed in briefing on the Government’s presentation of false evidence. The premise that a high percentage of Emperors failed to make a profit was a critical component of the Government’s pyramid scheme theory and Keep’s opinions and resulted in prejudice.

The Government also concedes that the court erred by admitting hearsay regarding the intention of purchasers of Emperor packages. This violated the Confrontation Clause. Therefore, the Government bears the burden of establishing beyond a reasonable doubt that the constitutional error was harmless. *Reiner v. Woods*, 955 F.3d 549, 555 (6th Cir. 2020). The Government cannot do so. McClelland testified that his investigation established that the motivation of the purchasers of Emperor packages was to share in casino profits and that it was not the products they received (such as the I2G Touch). (R.700,#10478-80.) This was a critical component of the Government’s theory bolstered by the power of testimony from the lead FBI agent because it was necessary to establish that all of the products provided to Emperors were incidental aspects of the transaction. The Government argues that certain purchasers also so testified at trial. But no one at trial (other than McClelland) purported to speak for the entire class of purchasers. Moreover, evidence concerning some purchasers contradicted McClelland’s sweeping conclusion. Purchasers expressed different motivations.  For instance, Colonel Glen Logan’s purchase was motivated by the master license for all current and future products and driving customers to the I2G fantasy sports. (R. 701,#10840,44)  Catrina Dugger testified that she was attracted to I2G because it was a “business that was ahead of its time in online entertainment and technology. It had an emphasis on customers that -- using items that I was actually doing today, for example, like games on your phone. I did a little bit in the fantasy sport.” (R.690,#9466-70.) Additionally, evidence at trial confirmed that others were motivated to purchase by the I2G Touch. (*See* US Ex.144 32:09-33:38.) McClelland’s improper bolstering of the notion that the thousands of Emperors purchased for the reason advanced by the Government prejudiced the defendants.

McClelland’s testimony about his conversation with the Plus-Five employee was also inadmissible hearsay and violated the Confrontation Clause. The question he answered asked him whether Plus-Five confirmed that his understanding of its invoices was accurate; McClelland’s affirmative response conveyed the out of court statements of Plus-Five.

It was also error to admit US Exhibit 685, and email from Maike sent to Barnes introduced to prove the truth of the matter of asserted—the existence of an “unaccounted for foreign bank account[]” in Hong Kong of Barnes dated April 2015. At trial, Barnes objected on hearsay and relevance grounds. (R.700,#10521-24.) The court ruled the email was admissible under Federal Rule of Evidence 801(d)(2)(E). The Government, however, did not even attempt to meet its burden of establishing the required elements to establish this and could not have done so. For example, an email sent after the conspiracy period was not in furtherance of the conspiracy. And the Government introduced proof (US Exhibit 692) that Maike started a new company in Asia named XTGI in 2015. US 685 violated the defendants’ Confrontation Clause rights. Also, the Government argues that that the email was relevant to demonstrate a potential location for the Emperor revenue that exceeded known bank deposits—a concept that derived solely from US 230, which the Government concedes was erroneously admitted. In any event, a speculative destination for I2G revenue is simply not probative of any element of the charges in the case, which were based on an alleged scheme to deceive people to purchase Emperor packages. Finally, the fact that the April 2015 email does not indicate when the bank account was opened means that only speculation could lead to a conclusion that the referenced bank account was opened during the Indictment period.

 Finally, McCelland introduced investigative hearsay and violated the defendants’ Confrontation Clause rights by testifying about what certain individuals represented by initials in the Indictment said to him during his investigation. The Government argues that it can circumvent the hearsay rules by asking an FBI agent what he learned during his investigation and simply repeating what people told him during interviews. This is false. Investigative hearsay is inadmissible, and the Government cannot prove beyond a reasonable doubt that it was harmless for the lead agent to bolster the Government’s effort to prove critical facts alleged in the Indictment through hearsay.

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