IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	No. 1:10cr485 (LMB)
JEFFREY ALEXANDER STERLING,	)	
	)	
Defendant.	)	
	)	

GOVERNMENT'S MOTION IN LIMINE TO ADMIT CERTAIN STATEMENTS OF JAMES RISEN, DR. CONDOLEEZZA RICE, AND HUMAN ASSET NO. 1

The United States, by and through its attorneys, hereby moves in limine to admit certain statements made by James Risen to third parties, statements made by Dr. Condoleezza Rice at the White House meeting, and excited utterances of Human Asset No. 1. Those statements can be identified as the statements contained within the following: (1) Risen's statements to William Harlow on April 3, 2003, *see* Dkt. 153, CIPA Ex. 103; (2) Risen's statements to William Harlow on April 4, 2003, *id*. at CIPA Ex. 104; (3) Risen's statements to William Harlow on April 25, 2003, *id*. at CIPA Ex. 105; (4) Risen's statements to William Harlow, George Tenet, and Dr. Condoleezza Rice at the White House on April 30, 2003, *id*. at CIPA Ex. 106; (5) Risen's statements to David Manners, (6) Dr. Condoleezza Rice's oral delivery of the talking points at the White House meeting on April 30, 2003, *id*. at CIPA Ex. 107; and (7) the excited utterances of Human Asset No. 1 on January 23, 2006, *id*. at CIPA Ex. 47.[1]

[1] Exhibits 103 through 107 are independently admissible as a business or official records of the CIA under Rules 803(6) and 803(8), and William Harlow will establish the foundational requirements for their admission. To the extent that the documents contain third party statements, such as Risen's statements, this motion in limine addresses that issue.

Statements in Categories 1 through 6 are admissible under Rule 807 of the Federal Rules of Evidence because sufficient evidence of circumstantial guarantees of trustworthiness exist for each one of the statements for their admission. In addition, all of Risen's out of court statements are admissible under Rule 804(b)(3) of the Federal Rules of Evidence because Risen's statements were against his proprietary interest when he made those statements.

Dr. Condoleezza Rice's oral delivery of the talking points to Risen and Jill Abramson of the *New York Times* at the White House meeting on April 30, 2003 are also separately admissible as a recorded recollection. Dr. Rice adopted the contents of the talking points prior to her delivery of them. Dr. Rice's memory of what she communicated to Risen and Abramson was fresh back on April 30, 2003, but she no longer has a sufficient recollection of the precise words that she used to deliver the talking points. Thus, the elements of Rule 803(5) have been met.

Finally, the statements of Human Asset No. 1 contained with CIPA Exhibit 47 are admissible as excited utterances. Human Asset No. 1 made the statements after having read Chapter 9 of *State of War*, realized that his identity and association with the CIA had been compromised, and made his statements while still under the stress of the continuing fear of reprisal and violence.

BACKGROUND

A. Risen's Statements to the CIA

On April 3, 2003, at 4:00 p.m., Risen called William Harlow (hereinafter "Harlow"), the director of the CIA's Office of Public Affairs. Harlow fielded press inquiries on a daily basis in his position, and therefore Harlow was familiar with Risen given Risen's work on national security matters for the *New York Times*. Harlow took contemporaneous, handwritten notes of

his telephone conversation with Risen, and then later typed those notes into an email, which he sent to senior management within the CIA at 6:43 p.m. on the same day. CIPA Exhibit 103 is Harlow's typed recordation of his telephone conversation with Risen. As reflected in CIPA Exhibit 103, Risen's statements related to Classified Program No. 1 and Human Asset No. 1.

The next day, Harlow received a follow-up telephone call from Risen at 10:43 a.m. Harlow again took contemporaneous, handwritten notes and used those notes to type an email to senior CIA management, which Harlow sent at 12:18 p.m. on the same day. CIPA Exhibit 104 is Harlow's typed memorialization of his telephone conversation with Risen on that day. The conversation related to Classified Program No. 1 and Human Asset No. 1.

On April 25, 2003, Harlow received another telephone call from Risen at 3:30 p.m. Again, consistent with his practice, Harlow took contemporaneous, handwritten notes and, based on those notes, typed and sent an email to senior CIA management at 4:16 p.m. on the same day. CIPA Exhibit 105 is Harlow's typed record of his telephone conversation with Risen on that day. The conversation related to Classified Program No. 1 and Human Asset No. 1, and during this conversation Risen confirmed that he possessed "documents" relating to the Classified Program No. 1.

Finally, on April 30, 2003, Harlow attended a meeting at the White House. Harlow, George Tenet, the Director of to the CIA, and Dr. Condoleezza Rice, the President's National Security Advisor attended the meeting on behalf of the government, and Risen attended along with the *New York Times*' Washington bureau chief, Jill Abramson, his immediate supervisor. One day later, Harlow wrote a memorandum to the file recording the White House meeting. CIPA Exhibit 106 is Harlow's typed memorandum memorializing that meeting. During that

meeting, Risen and Abramson confirmed that the *New York Times* had a fully realized draft of the story, and Risen stated that he had seen a letter relating to Classified Program No. 1 and Human Asset No. 1.

B. Risen's Statements to David Manners

In approximately 2003 or 2004, Risen told Manners that he had met Sterling, a former CIA colleague of Manners, that Sterling had told Risen that he had worked on a classified operation involving the Iranian nuclear weapons program, and that he had been instrumental in recruiting an asset involved in that operation. Risen told Manners that Sterling did not believe that CIA management had given him enough credit for his work on that operation. Manners told Risen that Sterling sounded disgruntled, and Risen ultimately agreed, telling Manners that he would not write the personal story about Sterling. Within a month or two of that conversation with Manners, Risen called Manners again and told Manners that he wanted to know if the CIA would use false plans to try to thwart the Iranian nuclear weapons program.

C. Dr. Rice's Oral Delivery of the Talking Points at the White House Meeting

Harlow created the talking points that Dr. Rice orally delivered to Risen and Abramson. *See* CIPA Exhibit 107. Harlow will testify that Dr. Rice reviewed the talking points, found them accurate, and adopted the talking points as her own. Finally, he will testify that Dr. Rice followed the talking points word for word and delivered each one of them accurately during the White House meeting.

If called to testify, Dr. Rice similarly would testify that she recognizes the talking points as the ones that she orally communicated to the *New York Times*. She will further testify that it was her habit, practice and custom to review the talking points prior to delivery of them, satisfy

herself that the talking points accurately reflected her thoughts and positions on the issues contained therein, and then adopted the talking points by delivering them. Dr. Rice will testify that the substance of the talking points was fresh in her memory at the time of the White House meeting because she orally delivered them to Risen and Abramson. Finally, she will testify that, given the significance of the issues discussed within the talking points, she would have been disciplined in her delivery of the talking points and adhered to the words contained within CIPA Exhibit 107. However, given the passage of time, she now does not have a sufficient memory of the precise words that she used to deliver the talking points, although she recalls delivering some of the main points contained within CIPA Exhibit 107. A declaration outlining her proposed testimony has been attached as Exhibit A.[2]

D. Human Asset No. 1's Excited Utterances on January 23, 2006

On or about January 23, 2006, after having read Chapter 9 and the information contained therein for the first time, Human Asset No. 1 contacted his CIA case officer and requested an unscheduled meeting. Human Asset No. 1 subsequently met with his CIA case officer and reported his fears and personal safety concerns for himself and his family. The case officer contemporaneously memorialized Human Asset No. 1's fears in a cable. *See* Dkt. 153, CIPA Exhibit 47. That cable demonstrates that Human Asset No. 1 made his statements to his CIA

[2] Because all of the statements at issue are not testimonial, *Crawford* does not apply. *See United States v. Udeozor*, 515 F.3d 260, 268 (4th Cir. 2008) (stating that the Crawford issue is "whether a reasonable person in the declarant's position would have expected his statements to be used at trial—that is, whether the declarant would have expected or intended to "bear witness" against another in a later proceeding."). *See also United States v. Jordan*, 509 F.3d 191, 201 (4th Cir. 2007).

case officer while still "under the stress of excitement" caused by the level of detail identifying him as the asset involved in Classified Program No. 1. In addition, the CIA case officer will testify at trial that he had never seen Human Asset No. 1 so shaken and scared than on that day as Human Asset No. 1 reported his fears and concerns to him.

I. Risen's Statements to Harlow and at the White House Meeting, His Statements to Manners, and Dr. Rice's Oral Delivery of the Talking Points Should be Admitted Under Rule 807 Because Those Statements Bear Sufficient Circumstantial Guarantees of Trustworthiness.

Rule 807 of the Federal Rules of Evidence provides that

> [a] statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Fed.R.Evid. 807.[3] Although the residual hearsay exception "is a narrow exception that should not be construed broadly," this exception exists for precisely those circumstance "[w]hen a party seeks to introduce out-of-court statements that contain strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available." *Tome v. United States,* 513 U.S. 150, 166 (1995)(discussing Rule 803(24)). "The most important element of Rule 803(24)'s requirements is that the district court properly determine that "equivalent circumstantial guarantees of trustworthiness" are present. *Dunford*,

[3]Rule 807 is a re-codification of former Rules 803(24) and 804(b)(5), and thus the same requirements for admitting evidence under these prior residual exceptions to the hearsay rule apply to Rule 807. *United States v. Dunford*, 148 F.3d 385, 392 n.2 (4th Cir. 1998). *See also United States v. Ochoa*, 229 F.3d 631, 638 (7th Cir. 2009).

148 F.3d at 393. The inquiry into trustworthiness requires a court to "examine the 'totality of the circumstances that surround the making of the statement' for 'particularized guarantees of trustworthiness.'" *United States v. Clarke*, 2 F.3d 81, 84 (4th Cir. 1993). *See also United States v. Halk*, 634 F.3d 482, 489 (8th Cir. 2011)(quoting *United States v. Shields*, 497 F.3d 789, 792 (8th Cir. 2007) ("`[T]rustworthiness is analyzed under a broad totality of the circumstances test.'"). "Trustworthiness must emanate from the circumstances of a hearsay statement, not from its consistency with other evidence offered in the case." *United States v. Shaw*, 69 F.3d 1249, 1253 n.5 (4th Cir. 1995).

The Fourth Circuit has considered various factors in determining whether out-of-court hearsay statements possess "circumstantial guarantees of trustworthiness." Those factors include the serious nature of the statements, *Dunford*, 148 F.3d at 393; the serious context in which the statements are made, such as to government officials, *id*.; *Clarke*, 2 F.3d at 84-85 (citing *United States v. Ellis*, 951 F.23d 580, 583 (4th Cir. 1991)); whether the statements are made on multiple occasions, *Dunford*, 148 F.3d at 393; the consistency of those statements, *id*.; the contemporaneous recording of those statements, *Clarke*, 2 F.3d at 85; a lack of motive to fabricate, *Shaw*, 69 F.3d at 1254; *Clarke*, 2 F.3d at 85; and the ring of reliability of those statements, *Shaw*, 69 F.3d at 1254; *Clarke*, 2 F.3d at 85.

In *Dunford*, 148 F.3d at 392, the defendant, who had been convicted of being a felon in possession of a firearm, argued that the district court erred by admitting the pre-trial, hearsay statements of his daughters under Rule 803(24). The defendant's daughters had made a series of prior statements to two social service workers, a school official and a police detective accusing their father of child abuse, which included the use of a firearm to threaten them in various ways.

Id. The government sought to admit the prior statements because the evidence of the defendant's use of the firearm "was important to the government because it provided direct evidence that [the defendant] knowingly possessed at least one of the guns" that he had been charged with possessing. *Id*. At trial, the daughters recanted their prior statements. *Id*.

The Fourth Circuit affirmed the district court's admission of the daughters' prior statements, finding that "in the total context in which the statements were made" there were "sufficient 'equivalent circumstantial guarantees of trustworthiness' to satisfy" the requirements of Rule 803(24). *Id*. at 393. The Court easily dispensed with the first three requirements of Rule 803(24), ruling: (1) that the first requirement had been met because the statements proved essential elements of the charged crimes; (2) that the second requirement had been satisfied because the proffered statements were the most probative piece of evidence that could be obtained through reasonable efforts; and (3) that the third requirement had been met because the admission of the statements promoted "the general purposes of the Rules and the interests of justice" by satisfying the jury's need to "weigh the credibility of all of the evidence" and to avoid "the suppression of the truth." *Id*. at 393-94.

In finding that the daughters' hearsay statements had the requisite circumstantial guarantees of trustworthiness, the Fourth Circuit focused on consistency, noting that "both daughters told different people of the gun incident at different times." *Id*. at 393. The *Dunford* court also identified the fact the statements were "made to government," and done so in "the most serious context," as important factors. *Id*. The Court also noted that there was physical evidence to corroborate one of the daughter's statements, and this physical evidence also offered a motive for the daughters' recantation in court. *Id*. In sum, the Court concluded that "[t]he serious nature of

the repeated statements made by the children to government officials as well as the consistency of their stories given to those officials provide clear indicia of the trustworthiness of their statements." *Id*.

Risen's statements made to Harlow on April 3, 2003, April 4, 2003, April 25, 2003 and during the White House meeting (hereinafter collectively referred to as "Risen's statements to the CIA"), Risen's statements to David Manners (hereinafter "Manners"), and Dr. Rice's oral delivery of the talking points are all admissible under Rule 807. First, all of the statements are evidence of material facts. The statements themselves are evidence of national defense information, and the statements also directly prove the unlawful disclosure of national defense information to Risen, thus establishing the essential elements of Counts One through Seven. Risen's statements to the CIA and to Manners also prove that someone provided classified information to Risen without the authorization of the CIA, thus proving the theft and misappropriation elements of Counts Eight and Nine. In addition, Risen's statements to the CIA and to Manners, when considered in conjunction with other evidence, prove the defendant's identity as Risen's source and exclude other individuals, such as the SSCI staffers, who the defendant now claims were the actual sources for Risen. Therefore, there cannot be a serious question that the above-described statements prove material facts in this case.

Second, Risen's statements to the CIA and to Manners and Dr. Rice's oral delivery of the talking points are more probative on those material facts than any other evidence that the government can procure through reasonable efforts. Risen is unavailable because he successfully invoked his qualified reporter's privilege. Harlow and Manners are the only witnesses (or one of the only witnesses as it relates to the White House meeting) who can testify about what Risen

said. There cannot be a serious question that the government expended "reasonable efforts" in attempting to secure Risen's testimony. Dr. Rice's oral delivery of the talking points and her request that the *New York Times* not publish Risen's pending story proves the potential damage and the closely held elements of national defense information.

Third, the general purposes of these rules and the interests of justice will best be served by admission of Risen's statements to the CIA and to Manners and Dr. Rice's oral delivery of the talking points into evidence. The government has a compelling interest in prosecuting government employees who leak national defense information. Two of the most important duties of the Executive Branch are prosecuting violations of federal criminal laws and protecting the nation's security secrets. Thus, there are few scenarios where the government's interests can be more profound and compelling than a criminal prosecution involving national security interests. *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."); *C.I.A. v. Sims*, 471 U.S. 159, 175 (1985) (noting the government's compelling interest "in protecting both the secrecy of information to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service").

Finally, an examination of the totality of the circumstances surrounding Risen's statements to the CIA and to Manners and Dr. Rice's oral delivery of the talking points demonstrates more than sufficient "circumstantial guarantees of trustworthiness" to admit those statements under Rule 807. An analysis of the various factors considered by the Fourth Circuit establishes the following:

A. The Serious Nature of the Statements

Risen's statements to Harlow and at the White House meeting and Dr. Rice's oral delivery of the talking points concerned a very serious subject matter. Risen's statements related to a highly sensitive and classified operation run by the CIA. Based upon information provided to Risen in 2003, Risen believed that the CIA had run a "deeply flawed and mismanaged [operation] from the start." Dkt. 115-2, ¶¶ 17, 19 (Affidavit of James Risen), thus prompting his belief that he possessed a newsworthy story regarding the competence of the CIA's intelligence operations. Dkt. 115-1, p. 5.

From the CIA's perspective, Risen learned about a highly classified operation and a human asset intimately involved with that operation that had been leaked in an unauthorized manner, thus prompting their concerns about the future integrity of the operation and the personal safety of the human asset. Risen clearly knew that the CIA took the revelation of this information seriously because Harlow told him as much on April 3rd, April 4th, and April 25th, and the CIA convened a meeting at the White House to ask the *New York Times* not to publish the story. The serious nature of Dr. Rice's oral delivery of the talking points is self-evident. Thus, this factor weighs heavily in favor of admission.

Similarly, Risen's statements to Manners were serious in nature. Risen used Manners as a sounding board for some of his stories, and Risen was attempting to assess the credibility of Sterling as a source. Given the nature of their relationship, and the significance of his story, Risen's statements to Manner were clearly serious in nature.

B. The Serious Context in which the Statements are Made

Risen made his statements to the CIA in a serious context because he made all of his statements to government officials. Risen made his statements to Harlow, who was the head of the CIA's Office of Public Affairs in 2003 and with whom Risen had regular contact. Risen knew that his ability to have Harlow and the CIA respond to any future inquiries, even if it meant a response of nothing more than a "no comment," depended upon his communicating with Harlow as openly and honestly as possible without revealing the identity of any of his confidential source(s).

Risen made his statements at the White House meeting to Harlow, the Director of the CIA, and the President's National Security Advisor. Moreover, Risen did so while in the presence of the *New York Times*' Washington bureau chief, Jill Abramson, his immediate supervisor and a representative of his employer. All of those facts demonstrate that he made his statements to Harlow and at the White House meeting in a serious context, thus weighing in favor of their admissibility.[4]

Risen's statements to Manners were also made in a serious context. Because Risen used Manners as a sounding board for his stories, it stands to reason that Risen needed to convey information to Manners as accurately as possible in order to obtain Manners' assessment of the credibility of Sterling's information. Once again, given the nature of Risen and Manners' relationship, and the significance of his story, Risen made his statements to Manner in a serious context.

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[4] Once again, the serious context in which Dr. Rice delivered the talking points is self-evident.

C. Making the Statements on Multiple Occasions

Risen also made his statements to the CIA on multiple occasions. His statements directly to Harlow occurred on April 3rd, April 4th, and April 25th, and his statements at the White House occurred on April 30th. Risen essentially repeated the same information except to the extent that Risen had more details about Classified Program No. 1 on April 25th. On April 30th, Dr. Rice and Tenet largely summarized the information that they understood Risen possessed, and not only did Risen and Abramson not deny that the *New York Times* possessed the information, they confirmed that Risen had a near final, fully realized draft of the story. Thus, the fact that Risen repeated the same information, or confirmed his possession of that information, on four separate occasions within only the span of a month confirms the inherent trustworthiness of his statements.[5]

D. Consistency of the Statements

Not only did Risen make his statements on multiple occasions, his statements and the information contained therein remained consistent. As set forth in CIPA Exhibits 103 through 106, Risen repeated the same basic information consistently in all of his conversations with Harlow or confirmed the substance of what he had said previously through his and Abramson's acknowledgment that Risen had a nearly final, fully realized draft of the story. Thus, the consistency with which Risen repeated the information enhances the trustworthiness of his statements.

[5] Although Risen's statements to Manners and Dr. Rice's oral delivery of the talking points occurred on a single occasion, no single factor is dispositive. Instead, the Fourth Circuit caselaw requires the court to analyze the totality of the circumstances.

Risen's statements to Manners were also consistent. When viewed in the context of and in proximity with Risen's statements to the CIA, the subject matter of Risen's statements to Manners are consistent with his statements to the CIA.

E. The Contemporaneous Recording of the Statements

All of Risen's statements to the CIA and Dr. Rice's oral delivery of the talking points were contemporaneously recorded. Harlow took contemporaneous, handwritten notes of all of his telephone conversations with Risen. Harlow then typed those notes into an email, which he then sent to senior management within the CIA. Harlow received the April 3rd telephone call from Risen at 4:00 p.m., and sent his email at 6:43 p.m. on the same day, only two and a half hours later. *See* CIPA Exhibit 103. Harlow received Risen's April 4th telephone call at 10:43 a.m., and sent his email at 12:18 p.m. on the same day, only a hour and a half later. *See* CIPA Exhibit 104. Harlow received Risen's April 25th telephone call at 3:30 p.m., and sent his email at 4:16 p.m. on the same day, only forty-five minutes later. *See* Exhibit 105. Finally, Harlow attended the White House meeting on April 30th, and one day later wrote a memorandum to the file recording the meeting with the *New York Times*. *See* Exhibit 106. Thus, Harlow's contemporaneous recording of Risen's statements and Dr. Rice's oral delivery of the talking points further support a finding of trustworthiness.

Manners did not contemporaneously record Risen's statements to him.

F. A Lack of Motive to Fabricate

Risen had no motive to fabricate his statements to the CIA or to Manners. In fact, he had the opposite motive. Risen knew that only Harlow could confirm or refute certain facts or some portions of his story. Assuming that Harlow could do so for any particular fact or facts,

Risen needed to report his information as accurately as possible to Harlow and the CIA. To do otherwise would hinder his ability to assess the reliability of the information that he possessed, and his future ability to verify other facts and information for other stories with the CIA. *See* Dkt. 115-6, Exhibit 14 (Affidavit of Scott Armstrong), ¶ 20 (stating that as a final draft is prepared, national security journalists often consult with one or more executive agencies to seek official comment or to provide a last opportunity for expression of official concerns, all of which may result in no changes, exclusions of certain details, or ongoing discussions that can last months or years). In addition, Risen and the *New York Times*' willingness to meet with the Director of the CIA and the President's National Security Advisor demonstrates their belief in Risen's story, further establishing that Risen had no motive to lie about information that he believed to be true. Finally, nothing in Risen's statements to Harlow or at the White House reflects blame-shifting or other indicia of untrustworthiness.[6]

The same analysis applies to Risen's statements to Manners. Risen used Manners as a sounding board, and Risen had no motive to provide false or untrustworthy statements to Manners. Risen knew that Manners could not serve as an effective sounding board for Risen if Risen did not communicate honestly with Manners.

G. Physical Corroboration

Physical corroboration exists for Risen's statements to the CIA and to Manners and for Dr. Rice's oral delivery of the talking points. First, Risen admitted as much when he told Harlow that he possessed documents during the April 25th telephone call and during the White House meeting when he stated that he had seen a letter. Second, the publication of the letter

[6] That Dr. Rice had no motive to fabricate is also self-evident.

appearing within Chapter 9 of *State of War* corroborates his oral statements to the CIA and to Manners. Risen had to have possessed the documents and the letter back in 2003 in order to publish the letter in January 2006, thus corroborating his oral statements back in 2003 to the CIA and to Manners. Third, Harlow's talking points corroborate Dr. Rice's oral delivery of them to Risen and Abramson.

H. The Ring of Reliability

Lastly, Risen's statements to the CIA and to Manners and Dr. Rice's oral delivery of the talking points have a "ring of reliability." For example, one would have to believe that Risen invented all of the information that he reported to Harlow and to Manners, and that it was only by sheer coincidence that the information possessed by Risen happened to match the same information underlying Classified Program No. 1. It defies common sense and the laws of nature to believe that such an occurrence could have happened solely by chance.

Accordingly, based upon the above, Risen's statements to the CIA and to Manners and Dr. Rice's oral delivery of the talking points have sufficient, circumstantial guarantees of trustworthiness to permit their admission under Rule 807. No single factor weighs against their admission; rather, the totality of circumstances warrant their admission.

II. Risen's Statements to Harlow and at the White House Meeting Should be Admitted Under Rule 804(b)(3) Because Risen's Statements Were Against His Propriety Interest and Precluded Any Future Claim of a Qualified Reporter's Privilege.

Rule 804(b)(3) excepts from the hearsay rules a statement

> which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. *Williamson v. United States*, 512 U.S. 594, 600-601 (1994). A statement is admissible under Rule 804(b)(3) exception if the speaker is unavailable; and the statement is actually adverse to the speaker's interest. *See United States v. Smith*, 383 Fed.Appx. 355, 356 (4th Cir. 2010)(unpublished)(citing *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir.1995)(internal quotation marks omitted). There is *no* requirement to demonstrate corroborating circumstances indicating the trustworthiness of the statements against interest where the hearsay statements are not being offered to exculpate the accused. *United States v. Jordan*, 509 F.3d 191, 201 n.6 (4th Cir. 2009) (stating that "[a]s Rule 804(b)(3) makes clear, however, corroborating circumstances are only required if the statement is `offered to exculpate the accused.'").

While Rule 804(b)(3) is most invoked for its exception for statements against penal-interest, Rule 804(b)(3) by its terms is much broader. Rule 804(b)(3) contains several other important exceptions that apply here: first, for statements against a "proprietary interest," and second, for statements rendering "invalid a claim by the declarant against another." See Fed.R.Evid. 804(b)(3). Risen's statements to the CIA and to Manners fall within each one of these exceptions.[7]

[7] This Court previously addressed the applicability of the penal interest exception of Rule 804(b)(3) as it related to Risen's statements to Manners. *See* Dkt. 148, pg. 24-27 (finding that "any statements by Risen to a third party that Sterling was his source would be admissible hearsay under Fed. R. Evid. 804(b)(3) as a statement against interest.").

Risen had a proprietary interest in the information communicated to him about Classified Program No. 1 by his confidential source(s) because Risen possessed a qualified reporter's privilege over that information. *See generally Black's Law Dictionary* 816 (7th ed.1999) ("proprietary interest" defined as "interest held by a property owner together with all appurtenant rights"). Neither this Court nor any party has disputed that, if Risen possessed a valid qualified reporter's privilege, then the privilege belonged to Risen, and only Risen could waive the privilege. *United States v. Cuthbertson,* 630 F.2d 139, 147 (3d Cir.1980) (citations omitted) ("[t]he privilege belongs to CBS, not the potential witnesses, and it may be waived only by its holder."). *See also* July 7, 2011 Transcript at 27 (hereinafter "Tr.") ("it is only the journalist who can decide whether or not to waive it."); Opinion, Dkt. 148, pg. 27 n.7. When found, that privilege protects not only the identity of Risen's confidential source(s), but also the information conveyed by those source(s) to Risen, and only Risen decides when he wants to waive its protections.

A reasonable person certainly would conclude that Risen had a proprietary interest in the identity of his confidential source(s) and their information. Risen's beliefs in this regard are well-documented. *See* Dkt. 115-2, Affidavit of James Risen, ¶ 52 ("[a]ny testimony I were to provide to the Government would compromise to a significant degree my ability to continue writing as well as the ability of other journalists to do so."); ¶ 55 ("[i]f a journalist were to withhold a source's name but provide enough information to authorities to identify the source, the promise of confidentiality would provide little meaningful protection to a source or potential source."); ¶ 64 ("[i]f I am forced to testify, it will immediately and substantially harm my ability to gather newsworthy information."). Other reporters have corroborated such a proprietary

interest in the identity of a confidential source(s) and their information as well. *See, e.g.,* Dkt. 115-6, Exhibit 18 (Affidavit of Dana Priest), ¶ 13.

At some point, Risen must disclose some facts received from a confidential source(s) in order to assess the reliability and validity of their information, and when he does, Risen forever loses his propriety interest in and any claim of privilege over that information. While Risen's decision to do so may be necessary or even to his advantage, his decision does not alter the fact that he forever loses any claim of ownership and privilege over that information. For example, when Risen decides that he must disclose some information to an executive agency official in order to verify its reliability, he loses control over that information. That executive agency official can disseminate the information as he or she sees fit, including to other reporters who may put a more favorable spin on a subsequent story, thereby blunting whatever prospective story Risen may have been working on. In the end, while a decision to disclose some information may be a calculated risk by Risen, such a decision does not change the fact that the decision is against his proprietary interest because Risen forever loses ownership and control over the information and effectively foregoes any claim of privilege over the same information.

Thus, Risen's statements to the CIA and to Manners fit within those exceptions under Rule 804(b)(3). Risen knew that he had a proprietary interest in the information provided to him by his confidential source(s), but needed to disclose some facts in order "to seek official comment or to provide a last opportunity for expression of official concerns" while also not revealing the identity of his confidential source(s). *See* Dkt. 115-2, Affidavit of James Risen, ¶¶ 56-58; Dkt. 115-6, Exhibit 14 (Affidavit of Scott Armstrong), ¶20. Risen forever lost his propriety interest in the information contained within his statements and forfeited any claim of privilege over that

information when he made his statements to the CIA and to Manners, making the calculated decision that the facts that he did reveal would not later identify his confidential source(s). The best evidence that Risen's statements to the CIA and to Manners were against his interest at the time of making them is the simple fact that his statements are now being used to prove the identity of the defendant as his confidential source.

III. Dr. Rice's Oral Delivery of the Talking Points During the White House Meeting Is Admissible as a Recorded Recollection Under Rule 803(5).

Even when a declarant is available, Rule 803(5) excepts from the hearsay rules

> [a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Fed.R.Evid. 803(5). "To be admitted, the Government must establish the foundation requirements that (1) the witness once had knowledge about matters in the document; (2) the witness now has insufficient recollection to testify fully and accurately; and (3) the record was made [or adopted at a time] when the matter was fresh in the witness's memory and reflected the witness' knowledge correctly." *United States v. Shorter,* 1999 WL 631244 at *2 (4th Cir. 1999) (unpublished). *See also United States v. Cash,* 394 F.3d 560, 564 (7th Cir. 2005) . The accuracy of a statement recorded by someone other than the declarant can be established "through the testimony of the person who recorded the statement." *United States v. Mornan,* 413 F.3d 372, 377-78 (3rd Cir. 2005); *United States v. Hernandez,* 333 F.3d 1168, 1178-79 (10th Cir. 2003) .

In the present case, Harlow created the talking points that Dr. Rice orally delivered to Risen and Abramson. *See* CIPA Exhibit 107.[8] Harlow will testify that Dr. Rice reviewed the talking points, found them accurate, and adopted the talking points as her own. Finally, he will testify that Dr. Rice followed the talking points word for word and delivered each one of them during the White House meeting.

If called to testify, and as set forth more fully in Exhibit A, Dr. Rice similarly would testify that she recognizes the talking points as the ones that she orally communicated to the *New York Times*. She also will testify that it was her habit, practice and custom to review the talking points prior to delivery of them, satisfy herself that the talking points accurately reflected her thoughts and positions on the issues contained therein, and then adopted the talking points as her own by delivering them. In addition, she will testify that the substance of the talking points was fresh in her memory at the time of the White House meeting because she orally delivered them to Risen and Abramson. She will testify that, given the significance of the issues discussed within the talking points, she would have been disciplined in her delivery of the talking points and adhered closely to the talking points. Finally, given the passage of time, Dr. Rice does not have a memory of the precise words that she used to deliver the talking points. Accordingly, the elements of Rule 803(5) have been met.[9]

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[8] Once again, Exhibit 107 is separately admissible as a business record of the CIA, and Harlow will establish the foundational requirements for their admission in his testimony. This section addresses the separate issue of Dr. Rice's oral delivery of those talking points.

[9] Rule 803(5) requires the declarant to appear in court and read the recorded recollection. Given that the talking points will be independently admissible as a business record, Dr. Rice's appearance solely to read two pages of talking points would seem to impose a considerable burden upon the Court and its security staff.

IV. Human Asset No. 1's Statements to His CIA Case Officer on January 23, 2006 Are Admissible As Excited Utterances under Rule 803(2).

Rule 803(2) of the Federal Rules of Evidence permits admission of "statement[s] describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." "To qualify under the excited utterance exception, (1) the declarant must have 'experienced a startling event or condition'; (2) she must have related the statement 'while under the stress or excitement of that event or condition, not from reflection'; and (3) the statement or utterance must have 'related[ed] to the startling event or condition.'" *United States v. Jennings,* 496 F.3d 344, 349 (4th Cir. 2007) (quoting *Morgan v. Foretich,* 846 F.2d 941, 947 (4th Cir.1988); Fed.R.Evid. 803(2)). The justification for admitting an excited utterance as an exception to the hearsay rule is based on the "assumption that an excited declarant will not have had time to reflect on events to fabricate." *Morgan,* 846 F.2d at 946.

Among the relevant factors considered to determine if a statement is an excited utterance are such factors as "(1) the lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements." *Jennings,* 496 F.3d at 349 (quoting *Morgan,* 846 F.2d at 947). "`[T]here is no precise amount of time between the event and the statement beyond which the statement cannot qualify as an excited utterance.'" *United States v. Smith,* 606 F.3d 1270, 1279 (10th Cir.2010) (quoting *United States v. Ledford,* 443 F.3d 702, 711 (10th Cir. 2005)). In fact, "'an excited utterance need not be contemporaneous with the startling event to be admissible.'" *United States v. Fell*, 531 F.3d 197, 231 (2nd Cir. 2007) (quoting *United States v. Jones,* 299 F.3d 103, 112 (2d Cir. 2002)). *See also United States v. Belfast*, 611 F.3d 783, 817-818 (11th Cir. 2010) (stating that the excited utterance need not be made contemporaneously

to the startling event). Instead, the lapse of time between the event and the declaration is just one of several factors to consider in the analysis. *Jennings,* 496 F.3d at 350 (quoting *Morgan,* 846 F.2d at 947).

Therefore, "the key question governing admission is 'whether the declarant was, within the meaning of Rule 803(2), "under the stress of excitement caused by the event or condition."'" *Fell*, 531 F.3d at 231 (quoting Jones, 299 F.3d at 112)(quoting *United States v. Scarpa,* 913 F.2d 993, 1017 (2d Cir.1990)). "At bottom, the analysis must focus on whether the declarant's statement was trustworthy by being made in circumstances where it would not be reasonable to conclude that the declarant fabricated the statement or incorrectly remembered the events related. in the analysis. *Jennings,* 496 F.3d at 350 (citing *Morgan,* 846 F.2d at 947-48). *See also United States v. Belfast*, 611 F.3d 783, 817-818 (11th Cir. 2010)(stating that it is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance); *Gross v. Greer,* 773 F.2d 116, 119-20 (7th Cir.1985) (finding that the district court properly admitted a statement made twelve hours after the startling event). Once a statement satisfies all of the elements of the test for an excited utterance, the statement is admissible under Rule 803(2) even though the statement's "reliability might be subject to challenge on such grounds as inconsistency with subsequent statements or the speaker's motive to fabricate." *United States v. Hadley*, 431 F.3d 484, 498 (6th Cir. 2005).

On or about January 23, 2006, after having read Chapter 9 and the information revealing his identity contained therein for the first time, Human Asset No. 1 contacted his CIA case officer and requested an unscheduled meeting. Human Asset No. 1 met with his CIA case officer

and reported his fears and personal safety concerns for himself and his family. The case officer contemporaneously memorialized Human Asset No. 1's fears in a cable, marked as Exhibit 47 in the Government's proposed CIPA exhibits, *see* Dkt. 153. That cable demonstrates that Human Asset No. 1 made his statements to his CIA case officer while still "under the stress of excitement" caused by the level of detail identifying him as the asset involved in Classified Program No. 1.

In addition to the statements recorded in the cable by the CIA case officer, the CIA case officer will testify at trial that he had never seen Human Asset No. 1 so shaken and scared than on that day as Human Asset No. 1 reported his fears and concerns to his CIA case officer. This particular CIA case officer served as Human Asset No. 1's primary handler from 2006 through late 2008 and had had a number of contacts with Human Asset No. 1during that period.

Although as much as twenty-four hours may have elapsed between Human Asset No. 1's reading of Chapter 9 and the meeting with his CIA case officer, Human Asset No. 1's fear had not ended or dissipated by the time of his meeting because the threat of violence from foreign adversaries remained constant and real for Human Asset No. 1. The revelation of his identity and association with the CIA placed Human Asset No. 1 and his family in great jeopardy, and his reaction and the nature of his statements were logical, commonsensical responses to this starling event. Given that Human Asset No. 1 made his statements while still operating under the continuing threat of reprisal and violence, his statements are inherently trustworthy and reliable under Rule 803(2).

CONCLUSION

WHEREFORE, the government respectfully requests that the Court grant its motion in limine and admit Risen's statements to the CIA and to Manners, Dr. Rice's oral delivery of the talking points to Risen, and the excited utterances of Human Asset No. 1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2011, I electronically filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to the following:

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/s/
William M. Welch II

DECLARATION OF DR. CONDOLEEZZA RICE

I, Condoleezza Rice, being duly sworn, state as follows:

1. I served as the Secretary of State for the United States of America from January 2005 until January 2009. Prior to my presidential appointment and confirmation as Secretary of State, I served as Assistant to the President for National Security Affairs from January 2001 to January 2005. As Assistant to the President for National Security Affairs, I advised the President of the United States on matters of national security, national defense, and intelligence, and I acted on behalf of the President and the National Security Council on various national security, defense, and intelligence matters. .

2. On or about April 30, 2003, I orally delivered a set of talking points to representatives of the *New York Times*, including the reporter James Risen, at the White House. The talking points had been prepared and given to me by officials of the Central Intelligence Agency. I recognize the talking points that I communicated to the *New*

York Times as those attached to this declaration as Exhibit A. At the time I communicated those talking points, the substance of the talking points was fresh in my memory, and the talking points accurately reflected the essence of what I communicated to the *New York Times* representatives.

3. When serving as Assistant to the President for National Security Affairs, it was my habit, practice and custom to review talking points prior to delivering them in order to satisfy myself that I agreed with them and that the talking points accurately reflected my thoughts and positions on the issues contained therein. Given the importance of the issues discussed within Exhibit A, I have every reason to believe that I followed my habit, practice and custom with regard to the talking points attached as Exhibit A, and that I orally communicated the talking points contained within Exhibit A because they in fact accurately reflected my thoughts and positions on the issues contained within the talking points. In fact, because of the importance of the issues discussed within Exhibit A, it would have been my habit, practice and custom to review the

talking points more than once for accuracy.

4. Given the significance of the issues discussed within Exhibit A, I would have been disciplined in my delivery of the talking points to the *New York Times* representatives. I do not have a memory of, nor can I say, that I communicated the talking points word for word as written. While I have a present recollection of communicating several of the key points during this meeting, I presently do not have a recollection of the precise words that I used. Nevertheless, in light of the significance and importance of the message and the points being communicated, I would have adhered closely to the talking points contained within Exhibit A and been disciplined in my delivery of those points.

5. I had knowledge of the talking points attached as Exhibit A because I know that I personally communicated those talking points to the representatives of the *New York Times* at the White House. However, it has now been over eight years since that meeting, and I no longer possess a

sufficient recollection of the meeting and the specific talking points contained within Exhibit A to testify fully and accurately regarding the precise words I used in communicating the talking points.

6. I am confident, however, that I reviewed the talking points shortly before I communicated them to the *New York Times* representatives, adopted their contents because the talking points accurately reflected my thoughts and positions on the issues contained within Exhibit A, and orally communicated those talking points in a disciplined fashion that closely adhered to the talking points contained within Exhibit A. As such, the talking points attached at Exhibit A are an accurate recording of what I communicated to the representatives of the *New York Times* while those facts were still fresh in my memory.

Signed under the pains and penalties of perjury this day of October 1, 2011.

Dr. Condoleezza Rice