IT IS SO ORDERED.

Dated: November 12, 2025

Mina Nami Khorrami
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	Case No. 2:23-bk-52859
S&G HOSPITALITY, INC., *et al.*,[1]	:	Chapter 11
	:	Judge Nami Khorrami
Debtors.	:	(Jointly Administered)

MEMORANDUM OPINION AND ORDER DENYING RSS COMM2015-PC1 – OH BL, LLC'S AMENDED MOTION TO STRIKE INADMISSIBLE AND UNAUTHORIZED SETTLEMENT RECORDINGS PURSUANT TO FEDERAL RULE OF EVIDENCE 408 (DOC. 582)

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[1] The Debtors and the last four digits of their federal tax identification numbers are as follows: S&G Hospitality, Inc. (4566), Buckeye Lodging, LLC (6047), Lancaster Hospitality, LLC (8830), and Sunburst Hotels, LLC (0374). The Debtors' headquarters is located at 7500 Vantage Drive, Columbus, Ohio 43235. Individually, each debtor and debtor in possession are referred to as the "Debtor" and collectively they are referred to as the "Debtors."

I. Introduction

Creditor, RSS COMM2015-PCI-OH BL, LLC (hereinafter "RSS") seeks to strike from the Court's docket and to exclude from evidence certain recordings and testimony that it believes are inadmissible as settlement negotiations.[2] The Debtors opposed the Motion to Strike.[3]

RSS holds secured claims against each Debtor and has filed the same proof of claim[4] in each of the Debtors' cases. The Debtors have objected to portions of each of the RSS Claims.[5] In the Claims Objection, the Debtors quoted from a recording of a Zoom videoconference (the "Quoted Statements") held in April 2020 between the principal of the Debtors and the representative of the servicer of the loan. The Debtors also referenced a recording of a second Zoom videoconference held in May 2020 and provided a summary of that videoconference. Obj. to Proofs of Claim 12-13, Dkt. No. 518. In the Motion to Strike, RSS requests that the Quoted Statements be stricken from the Claims Objection, and that any recordings of both videoconferences (including, without limitation, the Quoted Statements) be excluded from evidence at the hearing on the Claims Objection.

A hearing (the "Hearing") on the Motion to Strike and Opposition was held on October 23, 2025.[6] Tami Kirby and Bruce Zabarauskas appeared on behalf of RSS. David Beck, Jill Spiker, and Jennifer Battle appeared on behalf of the Debtors. Testimony was taken from the

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[2] *RSS COMM2015-PC1 – OH BL, LLC'S Amended Motion To Strike Inadmissible And Unauthorized Settlement Recordings Pursuant To Federal Rule Of Evidence 408* (Doc. 582) (hereinafter the "Motion to Strike").

[3] *Opposition Of Debtors And Debtors In Possession To RSS COMM2015-PC1 – OH BL, LLC'S Motion To Strike And Amended Motion To Strike* (Doc. 587) (hereinafter the "Opposition"), and the reply of RSS to the Opposition, being *RSS COMM2015-PC1 – OH BH, LLC'S Reply Memorandum In Support Of Its Amended Motion To Strike Inadmissiable* [sic] *And Unauthorized Settlement Recordings Pursuant To Federal Rule Of Evidence 408* (Doc. 596) (hereinafter the "Reply").

[4] Each of the proofs of claim of RSS is referred to as an "RSS Claim" and they are collectively, the "RSS Claims."

[5] *Objection Of Debtors And Debtors In Possession To Proofs Of Claim Filed By RSS COMM2015-PC1-OH BL, LLC* (Doc. 518) (hereinafter the "Claims Objection").

[6] Numerous other matters, including the Claims Objection, valuation of the collateral for the RSS claims, confirmation of the Debtors' plan, and a motion filed by RSS to convert or dismiss this chapter 11 case were set for hearing on October 23, with additional hearing dates of October 24, 27 and 30, 2025. The Court had advised the parties that it intended to first hear and resolve the Motion to Strike as it relates to the other matters.

representative of the servicer of the loan and various documentary exhibits were admitted into evidence.

At the conclusion of the Hearing, the Court issued a brief oral ruling denying the Motion to Strike. As the Court emphasized, this was purely an evidentiary ruling and the Court was not making any findings or conclusions regarding the merits of the Claims Objection or other matters pending before the Court. The Court also noted that RSS would have the right, if it wished, to have the balance of the Zoom Recordings admitted into evidence under Rule 106 of the Federal Rules of Evidence (the "Evidence Rules") after the Debtors had offered the Quoted Statements into evidence. As the Court indicated, the issue of admissibility of the Quoted Statements is germane to the Claims Objection and other issues pending before the Court and thus the Court rendered an oral opinion denying the Motion to Strike to allow the parties to proceed with the other pending matters. The Court explained that the reasoning behind the Court's oral ruling would be provided in a written opinion later.[7]

II. Jurisdiction

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and the Amended General Order 05-02 entered by the United States District Court for the Southern District of Ohio, referring all bankruptcy matters to this Court. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), and (O). Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.

[7] The hearing on the Claims Objection (the "Claims Objection Hearing") commenced on October 23, 2025, immediately after the Court announced its oral ruling on the Motion to Strike. On October 24, 2025, the continuation of the Claims Objection Hearing was delayed at the parties' request to permit settlement discussions. In the afternoon of October 24, 2025, the parties reported to the Court that they had reached a resolution in principle that would take some time to formalize. The Court now issues this ruling to memorialize the basis for the Court's oral ruling announced on October 23, 2025.

III. Findings of Fact[8]

The facts relevant to the Motion to Strike are simple. The loan that is currently held by RSS and which forms the basis for the RSS Claims was originally incurred by the Debtors in 2015, and it is secured by mortgages on all of the Debtors' real properties and a blanket security interest on all of the Debtors' personal property. *See* RSS Ex. B1 – B5. There is no dispute about these loans, their validity, or the priority of the liens held by RSS.

The Debtors dispute the value of the collateral securing the RSS Claims and therefore the extent to which the RSS Claims are secured under 11 U.S.C. § 506, which will be resolved in a separate valuation proceeding. Further, the Claims Objection seeks to disallow portions of the RSS Claims related to interest, default interest, prior default interest,[9] and various fees which RSS has included in its proofs of claim. Obj. to Proofs of Claim 17-25, Dkt. No. 518.

Prior to the bankruptcy, in December 2019, the Debtors were given notice that their loan had been placed in special servicing, which resulted in the servicer changing from Wells Fargo Bank, N.A. (hereinafter "Wells Fargo") to Rialto Capital Advisors, LLC (hereinafter "Rialto"), the special servicer of the loans held by RSS. RSS Ex. D11. In April 2020, Michael Strickland (hereinafter "Mr. Strickland"), a representative of Rialto, held a Zoom videoconference (the "April Zoom Videoconference") with the Debtors' principal, Abhijit Vasani (hereinafter "Mr. Vasani"). In May 2020, these parties held a second Zoom videoconference (the "May Zoom

[8] Given the limited evidence submitted at the Hearing, these findings of fact are made for the sole purpose of resolving the Motion to Strike and are not intended to have preclusive effect on other matters pending in this case before the Court.

[9] "Prior default interest" refers to default interest that had accrued before the transfer of the loan to special servicing on December 19, 2019. Resp. to Obj. to Proof of Claim at 25, Dkt. No. 548. "Default interest" refers to interest that accrued afterward. *Id*.

Videoconference").[10] It is undisputed that Mr. Vasani recorded the Zoom Videoconferences. Am. Mot. to Strike 8, Dkt. No. 582; Opp'n 3, 5, Dkt. No. 587. Neither party elicited any testimony from Mr. Strickland regarding his knowledge or consent to the Zoom Recordings at the Hearing.

RSS, with the consent of the Debtors, was permitted to play each of the Zoom Recordings in open court at the Hearing. ECRO at 2:03:30. The parties' attention is primarily focused on an eighty-second portion of the beginning of the April Zoom Videoconference. The Debtors included a transcription of this portion of the April Zoom Videoconference in the Claims Objection (the "Transcription"); RSS quoted the Transcription in the Motion to Strike without any suggestion that the transcription was inaccurate. Obj. to Proofs of Claim 12, Dkt. No. 518; Am. Mot. to Strike 4, Dkt. No. 582. Having had the opportunity to listen to the recording at the Hearing, the Court was able to verify that the transcription of the Quoted Statements is accurate, and for that reason, the transcription of the Quoted Statements is reproduced here.

> Strickland: As we start the call, um, Rialto is not charging any default interest for April and May because of the virus, and, going forward, we are not charging you any. Period. Just, and, starting from April or May of this year, during the COVID-19 virus, regardless of how this call goes, regardless [of] if you sue us or anything, we have turned off that default interest and it will not calculate.
>
> Vasani: Thank you, and, Michael, I'm not suing you.
>
> Strickland: I - I know, I'm just saying.
>
> Vasani: So, yeah, thank you.
>
> Strickland: No matter what, we're going to have this call, but no matter what happens, that is done. Uh, Mark and Alekos will adjust our calculations, but we are going to dial that back to basically focus on the time period between when you came over to special servicing, which was in December, and right now. Okay?

[10] The April Zoom Videoconference and the May Zoom Videoconference are collectively the "Zoom Videoconferences," and the recordings of the April Zoom Videoconference and the May Zoom Videoconference are collectively, the "Zoom Recordings."

ECRO at 2:06:56-2:08:05.[11]

At the beginning of the April Zoom Videoconference, Mr. Strickland stated, "we're in the Atlanta office . . . . Miami's too hot for my taste." ECRO at 2:03:50 – 2:04:04. In his testimony, Mr. Strickland stated that he was attempting to say simply that Rialto had an Atlanta office and that was his primary office location. ECRO at 10:58:30-10:59:50. He also testified that he did not remember where he was located during the April Zoom Videoconference. *Id* at 10:59:30. Mr. Strickland also testified that during the time of the two Zoom Videoconferences, he lived in Alabama. ECRO at 10:58:55. Although other representatives from Rialto appeared to be present for both Zoom Videoconferences, no evidence was provided regarding whereabouts of any of the other participants during either Zoom Videoconference. The recordings did not indicate that those other participants made any meaningful contributions to the discussion – all the substantive discussion was between Mr. Strickland and Mr. Vasani.[12]

The Debtors signed a pre-negotiation letter (the "PNL") on February 7, 2020. RSS Ex. D17. The PNL had an effective date of December 19, 2019, being the date Mr. Strickland had signed it on behalf of Rialto. *Id*. at 4. Paragraph 1 of the PNL provides as follows:

> The Parties agree that any and all subsequent discussions, negotiations, correspondence, communications, meetings among the Parties, statements, drafts of documents (including, without limitation, unexecuted drafts of this document),

[11] For consistency of reference when citing to the Quoted Statements or anything else contained in the recordings, the Court will cite to the times provided in its Electronic Court Reporting System ("ECRO"). The recordings of the Zoom Videoconferences were not offered into evidence as exhibits at the Hearing, but they were made part of the record when they were played in open court and recorded on the Court's ECRO recording system. ECRO at 2:03:30 – 2:31:01 (April Zoom Videoconference); ECRO at 2:32:00 – 3:03:30 (May Zoom Videoconference). No evidence of the date of either Zoom Videoconference was presented at the Hearing. Counsel for RSS represented (without contradiction by the Debtors) that the April Zoom Videoconference occurred sometime in April 2020 but could not be more specific. ECRO at 2:31:25. Counsel for RSS stated (again without contradiction by the Debtors) that she believed that this second videoconference may have been shortly before Memorial Day in 2020. The recording of the May Zoom Videoconference contains approximately five minutes of additional recording after the videoconference ended. The parties stipulated that these five minutes contained irrelevant discussions involving Mr. Vasani after the videoconference had ended that were inadvertently recorded, and they were not played at the Hearing at the joint request of the parties. ECRO at 3:03:53-3:04:25.

[12] Likewise, although Mrs. Vasani was present for the April Zoom Videoconference, Mr. Vasani spoke on behalf of the Debtors.

> financial information or projections concerning the Loan and the Loan Documents between the Parties and from the Effective Date of this Agreement (collectively, "Negotiations") shall be considered compromise and settlement negotiations and propositions made with a view to a compromise and settlement, and that all such Negotiations shall be protected accordingly and shall not be discoverable or admissible as evidence on any issue that may be before any court, arbitrator, or other tribunal.

Id. ¶ 1.[13]

The PNL was signed by Mr. Vasani on behalf of each of the Debtors and in his individual capacity as a guarantor. *Id.*at 6. It was also signed by Mr. Strickland on behalf of Rialto as the special servicer. *Id.*at 5.[14] Evidence was admitted at the Hearing reflecting that Mr. Strickland would not discuss many of the details of the loan with Mr. Vasani, including why the loan had been transferred into special servicing and other information, such as the current balances and the amount needed to bring the loan current, until Mr. Vasani had signed the PNL. ECRO at 11:13:15 – 11:13:40. Mr. Strickland also admitted that before the transfer of the loan to special servicing, the Debtors had access to an online portal maintained by Wells Fargo, the master servicer, which allowed the Debtors access to substantial information regarding the loan. ECRO at 11:12:15 – 11:12:40. He also acknowledged that the Debtors lost access to this portal upon the transfer of the loan servicing to Rialto, and that Rialto did not offer any kind of comparable portal or online access to information. ECRO at 11:12:40 – 11:12:55.

Mr. Strickland conceded during his testimony that communications that simply exchanged information were not "negotiations" under Paragraph 1. ECRO at 11:16:21. For example, he agreed that Debtors' Exhibit 8, which was an email string related to the Debtors' requests for

[13] Paragraph 1 of the PNL will hereafter be referred to as "Paragraph 1."

[14] Paragraph 13 of the PNL is somewhat confusing regarding Rialto's status under the PNL. The PNL bears Mr. Strickland's signature, and he testified that he signed it on behalf of Rialto. RSS Ex. D17, p. 4-5; ECRO at 10:45:45-10:46:00. Paragraph 13 first provides that Rialto is a party to the PNL and therefore is both bound by it and entitled to claim the PNL's benefits. But later in the same paragraph, the PNL states that Rialto is not a signatory to the PNL and instead would be treated as a third-party beneficiary of the PNL. No testimony was offered to clarify this point.

disbursements from a reserve account to pay for repair work at the hotels, was not a settlement communication under Paragraph 1. ECRO at 11:23:16. He also agreed that Debtors' Exhibit 5, conveying a brand compliance report issued after the franchisor of one of the Debtors' hotels had conducted an inspection, was not a settlement communication. ECRO at 11:18:08. Mr. Strickland asserted, however, that in his view, everything he said in the Zoom Videoconferences was a settlement communication. ECRO at 11:03:20.

In subsequent portions of the April Zoom Videoconference, after Mr. Strickland had made the Quoted Statements, the parties went on to discuss various proposals for how the Debtors could bring the loan current. The parties exchanged proposals; these discussions were explicitly identified as conditional and both sides acknowledged that they would only become effective upon signing a definitive forbearance agreement. These discussions continued in the May Zoom Videoconference, which also extensively addressed workout terms for other loans on hotels owned and operated by other entities owned by Mr. Vasani that are not parties to the Debtors' loan agreements.[15]

IV. Legal Analysis

RSS advances three arguments in support of the Motion to Strike. First, it argues that Rule 408 of the Federal Rules of Evidence makes the Quoted Statements inadmissible because they were either offers to compromise or were made during a settlement discussion. Second, RSS argues that Paragraph 1 provides an independent basis for exclusion by defining all communications between Rialto and the Debtors as settlement communications regardless of their actual topic. Finally, RSS argues that Florida law[16] requires that each party to a conversation must

[15] The details of the forbearance proposals discussed after the Quoted Statements are not relevant to the Motion to Strike and therefore the Court will not include the details of those discussions in this Opinion.

[16] Paragraph 13 of the PNL provides that "[t]his Agreement . . . shall be governed by the laws of the State of Florida." RSS Ex. D17.

consent to its recording, and it argues that Rialto did not consent. Am. Mot. to Strike 4-8, Dkt. No. 582. The Motion to Strike requests that the Quoted Statements be stricken from the Claims Objection. *Id*. at 1. It also asks that the Debtors be precluded from using the Zoom Recordings during these proceedings. *Id*.

The Debtors contest the Motion to Strike for several reasons. They argue that Rule 408 does not apply because the Quoted Statements set forth an unconditional statement and were not proposing a compromise. Opp'n 8-9, Dkt. No. 587. They also argue that the Quoted Statements are not offered to establish the invalidity of the RSS Claims or their amount. *Id*. at 10-11. As to the PNL, the Debtors argue that RSS itself did not treat all communications between Rialto and the Debtors as settlement communications. *Id*. at 12-14. And that the Quoted Statements were not part of a negotiation and should not be barred from evidence by the PNL. *Id.* at 14. Finally, the Debtors argue that Fla. Stat. § 934.06 is not applicable because Mr. Strickland was neither a Florida resident nor physically in Florida at the time he made the Quoted Statements. *Id*. at 15-16.

A. There Is No Basis To Strike The Quoted Statements From The Claims Objection or Other Documents Filed With the Court

In the Motion to Strike, RSS did not cite to any provision in the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure (hereinafter the "Bankruptcy Rules"), or the portions of the Federal Rules of Civil Procedure (hereinafter the "Civil Rules") that are made applicable in contested matters by Bankruptcy Rule 9014, that authorizes this relief. Rather, RSS cites to Evidence Rule 408 and Civil Rule 12(f).[17] Am. Mot. to Strike 5, Dkt. No. 582. But Evidence Rule 408 says nothing about striking matters from filings with the Court, and Civil Rule 12(f) does not

[17] Civil Rule 12(f) provides that the "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

apply in contested matters such as a claims objection. Fed. R. Bankr. P. 9014(c); *In re Richter*, 478 B.R. 30, 49-50 (Bankr. D. Colo. 2012). Therefore, the cases relied upon by RSS, including *M.F. v. Cleveland Metro. Sch. Dist.*, 2024 WL 4564423 (N.D. Ohio Oct. 24, 2024), are distinguishable because they are district court cases where Civil Rule 12(f) applied.

The power of bankruptcy courts generally to regulate matters appearing on their public dockets is governed by 11 U.S.C. § 107 and Bankruptcy Rule 9018. Section 107(b) provides that the Court can (1) protect any entity regarding a trade secret or other confidential research, development, or commercial information, or (2) protect an entity from scandalous or defamatory matter in any document filed in a bankruptcy case. Rule 9018 adds that the Court can protect governmental matters made confidential by statute or regulation. RSS does not argue that these provisions apply here.

But there is a more fundamental issue with the request to strike the Quoted Statements from the record: RSS has not shown how it is prejudiced by the fact that they appear in the public version of the Claims Objection. 11 U.S.C. § 107(b) and Bankruptcy Rule 9018 require a showing of prejudice. *Togut v. Deutsche Bank AG (In re Anthracite Cap., Inc.)*, 492 B.R. 162, 179 (Bankr. S.D.N.Y. 2013) ("The party seeking to seal any part of a judicial record bears the heavy burden of showing that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure.") (citation modified).[18]

RSS has not asserted any prejudice, which would meet the high bar of "clearly defined and serious injury." And the absence of any such prejudice is evident by the fact that RSS itself has reproduced the Debtors' transcription of the Quoted Statements in the Motion to Strike. Am. Mot.

[18] Assuming it could apply here, Civil Rule 12(f) likewise requires a showing of prejudice. *Richter*, 478 B.R. at 50 ("Moreover, even if the Court were to consider the Debtor's Motion to Strike as a request for equitable relief . . . the Debtor has not alleged or demonstrated any prejudice suffered.").

to Strike 4, Dkt. No. 582. This reveals that RSS does not believe that it is prejudiced by the Quoted Statements appearing in the public record. The Court therefore declines to strike the Quoted Statements. Since RSS has also requested that the Quoted Statements be excluded from evidence at the Claims Objection Hearing, the Court will now consider whether Evidence Rule 408, Paragraph 1, or Fla. Stat. § 934.06 make the Quoted Statements clearly inadmissible.

B. The Court Will Treat The Motion To Strike As A Motion In Limine

As both parties ultimately concede, the real issue here is the admissibility of the Quoted Statements at the Claims Objection Hearing. Opp'n 7, Dkt. No. 587; Reply Mem. 4, Dkt. No. 596. Accordingly, the Motion to Strike should be viewed as a motion in limine. "A motion in limine is any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Louzon v. Ford Motor Co.*, 718 F.3d 556, 561 (6th Cir. 2013). The moving party must meet the demanding burden of showing that the evidence sought to be excluded is clearly inadmissible on all potential grounds. *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, 677 F. Supp. 3d 730, 733 (S.D. Ohio 2023).

In fact, since the Claims Objection will be heard and resolved by the Court, this demanding burden is even higher, because the concern underlying many motions in limine about a jury hearing inadmissible evidence does not exist in a bench trial. When the Court sits as the trier of fact, it may hear the challenged evidence and consider its admissibility as it assesses the weight of the evidence. A "trial judge sitting alone is presumed capable of weighing evidence to sift the important from the unimportant, and even the admissible from the inadmissible when those are intertwined in a way that might counsel excluding the same evidence from consideration by a lay jury." *Hobart Corp. v. Dayton Power & Light Co.*, 2020 U.S. Dist. LEXIS 22813, at *67-68 (S.D. Ohio Feb. 10, 2020) (quoting *UAW v. Gen. Motors Corp.*, 235 F.R.D. 383, 387 (E.D. Mich. 2006)).

1. Evidence Rule 408 Does Not Prohibit Admission of the Quoted Statements

Evidence Rule 408(a) makes inadmissible certain statements or conduct if offered to prove or disprove the validity or amount of a disputed claim. Rule 408 provides as follows:

> (a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> > (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
> >
> > (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

Rule 408(a) only excludes offers to compromise or statements made in compromise negotiations. *Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher*, 123 F.R.D. 237, 242 (S.D. Ohio 1987) ("For Rule 408 to be applicable, the Court must first determine that compromise negotiations were in fact happening. But no such thing was occurring here."). A compromise, or negotiations regarding a compromise, is inherently conditional. An unconditional statement that does not require the opposing party to agree to do, or refrain from doing, anything is not barred by Rule 408 because there is no offer to compromise. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 909 (2d Cir. 1997); *Geiger v. Kraft Foods Glob., Inc.*, 2008 U.S. Dist. LEXIS 16604, at *6 (S.D. Ohio 2008); *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 598 F. Supp.3d 639, 645 (E.D. Mich. 2022). For example, an offer by a lender to modify a mortgage loan that was not conditioned on any particular action by the borrower was not subject to Rule 408(a) because the

lack of conditions meant that it was not an offer to compromise. *Maltbie v. Bank of Am*., 2013 WL 6078945, at *3-4 (E.D. Mich. Nov. 19, 2013).

Moreover, "to invoke the exclusionary rule, an actual dispute must exist, preferably some negotiations, and at least an apparent difference of view between the parties as to the validity or amount of the claim." *Allen v. Watts*, 2021 WL 4942725, at *3 (E.D. Mich. Oct. 21, 2021) (citation modified), *aff'd*, 2022 U.S. App. LEXIS 22301 (6th Cir. Aug. 9, 2022). It is unclear from the evidence at the Hearing that any of these conditions had been met. Indeed, one of the purposes for the April Zoom Videoconference was so that Mr. Vasani could understand Rialto's view on what was needed to bring the loans current, so that he could decide whether he disputed it or not.

But even assuming that there was a dispute that had crystalized before the April Zoom Videoconference, the Quoted Statements do not reflect any conditions on Mr. Strickland's statement that Rialto would stop charging default interest due to the COVID-19 pandemic. In fact, Mr. Strickland went further and affirmatively stated that this decision was unconditional: he said that default interest would not be charged "starting from April or May of this year, during the COVID-19 virus, *regardless of how this call goes, regardless [of] if you sue us or anything*, we have turned off that default interest and it will not calculate." ERCO at 2:07:15 – 20:07:30 (emphasis added). Mr. Strickland thus made it perfectly clear that Rialto was not asking for anything in exchange when he made the Quoted Statements.

Likewise, there is no evidence that at the point in the April Zoom Videoconference when the Quoted Statements were made, the parties were discussing any kind of compromise, and therefore the statements cannot be viewed as having been made during a compromise negotiation. The fact that the framework for a forbearance agreement was proposed and discussed later in the April Zoom Videoconference does not mean that the entire discussion was a compromise

negotiation. *See, e.g.*, *Bourhill v. Sprint Nextel Corp*. 2013 WL 265972, at *5 (D.N.J. Jan. 23, 2013) (holding that although the second paragraph of a letter would be excluded because it arguably was a settlement communication, the first paragraph was admissible because it was not).[19] In fact, there was a notable contrast between the Quoted Statements and the discussions contained in the balance of the call. The latter discussions were explicitly and repeatedly acknowledged by both Mr. Strickland and Mr. Vasani to be conditional, and exploratory. The Quoted Statements, in contrast, were explicitly unconditional.

Even where evidence is from a compromise negotiation, Evidence Rule 408(b) explicitly provides that such evidence may still be admissible for another purpose. Such purposes include "establishing bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal prosecution or investigation." The enumerated list under Rule 408(b) is non-exclusive. *FCA US*, 598 F. Supp. 3d at 645. The "other purpose" may negate an opponent's claim in whole or in part, so long the evidence is not used to establish or refute the elements of the "primary claim in dispute." *PRL USA Holdings, Inc. v. U.S. Polo Ass'n, Inc.*, 520 F.3d 109, 114-15 (2nd Cir. 2008) (holding that settlement communications may be introduced to establish estoppel).

One purpose recognized by the courts is to show that a statement made in a settlement negotiation was made to induce reliance or made in bad faith. *PRL Holdings*, 520 F.3d at 114-15; *Stryker Corp. v. XL Ins. Am., Inc.*, 2013 WL 3276408, at *3 (W.D. Mich. June 27, 2013) (holding that settlement negotiations may be admissible to show waiver or estoppel); *Allen* 2021 WL

[19] Several cases follow this course with written communications and hold that the portion related to settlement should be redacted but allow the remainder to be admitted. *Bourhill*, 2013 WL 265972, at *5 (collecting cases). There is no reason why oral communications should be treated differently.

4942725, at *3 (Rule 408(b) permits use of statements made in settlement negotiations to show fraud or bad faith).

Indeed, where a party alleges that some wrong was conducted during settlement negotiations, the Sixth Circuit has held that "Rule 408 does not prevent the plaintiff from proving his case; wrongful acts are not shielded because they took place during compromise negotiations." *Uforma/Shelby Bus. Forms, Inc. v. NLRB.*, 111 F.3d 1284, 1293 (6th Cir. 1997) (citation modified). Similarly, the Seventh Circuit has stated that "[i]t would be an abuse of Rule 408 to allow one party during compromise negotiations to lead his opponent to believe that he will not enforce applicable time limitations and then object when the opponent attempts to prove the waiver of time limitations." *Bankcard Am., Inc. v. Universal Bankcard Sys., Inc.*, 203 F.3d 477, 484 (7th Cir. 2000). Here, it would equally be an abuse of Rule 408 to allow Rialto to make unqualified statements that it would not charge default interest during the pandemic and then to exclude those statements when the Debtors object to inclusion of default interest in a proof of claim. The interests of justice demand that the Court have the benefit of the totality of the circumstances when it rules on the Claims Objection.

2. The PNL Does Not Prohibit Admission of the Quoted Statements

Next, RSS argues that Paragraph 1 converts all communications of any kind between the parties into settlement negotiations that are automatically inadmissible in any court proceeding. Paragraph 1 is very broad. It provides that any communication of any type or form between Rialto and the Debtors is considered a settlement communication that will not be admissible in any court proceeding. Paragraph 1 thus sweeps much more broadly than Evidence Rule 408 in two particulars. First, its broad language deems all communications to be settlement negotiations and

makes them inadmissible regardless of whether Rule 408(a) applies. Second, it does not contain any provision allowing such communications for other purposes under Rule 408(b).

In addition, the Court will not enforce Paragraph 1 as written for two specific reasons. First, Mr. Strickland acknowledged that, in his understanding, statements conveying information would not be regarded as settlement communications. ECRO at 11:16:21. Mr. Strickland testified that, in his view, all the discussions in the Zoom Videoconferences were "negotiations" under Paragraph 1 because they took place after the effective date of PNL, December 19, 2019. ECRO at 11:03:20. But Mr. Strickland's statement at the outset of the April Zoom Videoconference that default interest would not be charged during the pandemic is certainly like the other examples of "conveying information" that he agreed would not be a "negotiation."

Mr. Strickland testified, for example, that his statement in an email that the loan had been transferred to Rialto for special servicing as the result of an "imminent, non-monetary default" was not a "negotiation" because it conveyed information. ECRO at 11:16:21; Debtors' Ex. 3. Likewise, he viewed Mr. Vasani's email transmitting a brand compliance report from one of the Debtors' franchisors as simply conveying information. ECRO at 11:18:08; Debtor's Ex. 5. Similarly, Mr. Strickland's statement that Rialto would not be charging default interest simply conveyed information regarding a decision that Rialto had made. The fact that it happened in a meeting that then turned into a discussion of potential forbearance agreements does not make the Quoted Statements part of a "negotiation."

Even if the Quoted Statements were deemed part of a "negotiation" under Paragraph 1, the Court concludes that Paragraph 1 is not enforceable. Neither party has cited any case law regarding the ability of parties to expand Evidence Rule 408's exclusionary rule by contract well before any pending litigation. The Court's own independent research has located a case that appears to be on

point. *See In re Nigro HQ LLC*, 2019 Bankr. LEXIS 1543 (Bankr. D. Nev. May 3, 2019). *Nigro HQ*, like this case, addressed a pre-negotiation agreement that purported to broadly render inadmissible all evidence of conduct and discussions thereunder. *Id*. at *9 n.13. The court concluded that its role regarding settlement offers and settlement communications generally was as set forth in Evidence Rule 408, and it noted that neither party had "provided any authority that the parties' purported desire to contract away the court's gatekeeping function is enforceable." *Id*. at *11.[20] As a result, it denied the lender's motion to exclude evidence of discussions between the parties.

The Court follows *Nigro HQ* here as it is consistent with other authorities that cast doubt on efforts to expand the exclusionary rules under Evidence Rule 408 by contract beyond the bounds set in the Evidence Rules. Of note is a Florida appellate decision holding that parties may not, by contract, modify the rules of evidence. *Kimbro v. Metro. Life Ins. Co.*, 112 So.2d 274, 277 (Fla. Ct. App. 1959); *see also Baquero v. Lancet Indem. Risk Retention Grp., Inc.*, 2013 WL 5237740, at *5 (S.D. Fla. Sept. 17, 2013) (stating that *Kimbro* provides "a correct statement of the law" on this point, though the court found *Kimbro* inapplicable).[21] Therefore, it appears that Paragraph 1 is unenforceable as a matter of Florida contract law.

In addition, "inasmuch as testimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence, any such privilege must be strictly construed." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189, 110 S. Ct. 577, 107 L.Ed.2d 571 (1990) (citation modified). Since exclusionary rules such as Rule 408 must be strictly construed,

[20] In a prior unpublished order denying the lender's motion in limine earlier in the case, the *Nigro HQ* court had noted that "the existence of a PNA between the parties is not dispositive of whether settlement communications are admissible in a later proceeding." *In re Nigro HQ*, *LLC*, Case No. 11-21014-MKN, Dkt. No. 693, at p. 5 (Bankr. D. Nev. Oct. 4, 2018).

[21] As noted above, the PNL specifies that it is governed by Florida law. Ex. D17, ¶ 13.

the Court questions whether parties may expand those exclusionary rules by contract. The Supreme Court has recognized that contracts that expand exclusionary rules and privileges impair the courts' truth-seeking function by excluding relevant information. *United States v. Mezzanatto*, 513 U.S. 196, 204-205, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995) ("A contract to deprive the court of relevant testimony stands on a different ground than one admitting evidence that would otherwise have been barred by an exclusionary rule. One contract is an impediment to ascertaining the facts, the other aids in the final determination of the true situation.") (citation modified). Indeed, in *Mezzanatto*, the court upheld a limited waiver of Evidence Rule 410 (which generally makes plea negotiations inadmissible in criminal cases) precisely because the waiver resulted in the admission of more evidence: "The admission of plea statements for impeachment purposes *enhances* the truth-seeking function of trials and will result in more accurate verdicts." *Mezzanatto*, 513 U.S. at 204.

This concern is heightened further here, where the evidence indicates a substantial imbalance in bargaining power that strongly suggests that the PNL was not the product of the Debtors' voluntary choice. Here, the evidence shows that Mr. Vasani signed the PNL because he had no other means to obtain loan specific information that the Debtors needed. As a result of the transfer to special servicing by Wells Fargo, the Debtors had lost access to Wells Fargo's online portal, which allowed them to track information related to the loan, including balances, fees, accrued interest, payments received, and application of payments. Mr. Strickland acknowledged that the Debtors' access to the portal was terminated when Rialto was appointed as special servicer, and that Rialto did not have any similar portal that provided online access to loan information. ECRO at 11:12:15 – 11:12:55. Once Rialto became the special servicer, the only way for the Debtors to obtain any information about the loan was to contact Rialto. ECRO at 11:12:52. Indeed,

Mr. Strickland told Mr. Vasani as little as possible about why the loan had been transferred to special servicing precisely to induce him to sign the PNL. ECRO at 11:16:21. The circumstances here indicate that the Debtors signed the PNL because they had no choice and no meaningful alternative, and not because they had freely agreed to the evidentiary rules set forth in Paragraph 1. *See Mezzanatto*, 513 U.S. at 210 (holding that a party may be relieved of an evidentiary stipulation waiving the provisions of Evidence Rule 410 where the agreement was procured by fraud or coercion or was otherwise involuntary or unknowing).

For all these reasons, the Court declines to apply Paragraph 1 and instead holds that Evidence Rule 408 governs admissibility here. As discussed above, the Court has determined that the Quoted Statements are admissible under Rule 408.

3. The Florida Security of Communications Act Does Not Apply

Finally, RSS relies on the Florida Security of Communications Act (the "FSCA"), Fla. Stat. Chapter 934. The FSCA requires the consent of all parties to a communication before it is recorded or otherwise intercepted. Fla. Stat. § 934.03(2)(d).[22] The FSCA also makes recordings made without consent inadmissible in certain court proceedings. Fla. Stat. § 934.06.[23] RSS argues that § 934.06 prohibits the admission of the Quoted Statements in this Court. The Court concludes, however, that the FSCA is not applicable here because there is no evidence the Quoted Statements were spoken in Florida or by a Florida resident. And even if the FSCA could apply generally to

[22] Fla. Stat. § 934.03(1) generally prohibits the interception of wire, oral, or electronic communications. Fla. Stat. § 934.03(2)(d) provides an exception "when all of the parties to the communication have given prior consent to such interception."

[23] Fla. Stat. § 934.06 provides, in relevant part, that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter."

the Quoted Statements, the exclusionary rule established by § 934.06 is explicitly limited to courts and agencies of the state of Florida and does not apply here.

The Florida Supreme Court has held that the prohibited "interception" takes place where the communication originates, and not where it is recorded or where the recording might later be played. *State v. Mozo*, 655 So.2d 1115, 1117 (Fla. 1995). As a result, the FSCA only applies where the words that were intercepted were spoken in Florida or were spoken by a Florida resident. *Cohen Bros, LLC v. ME Corp., S.A.*, 872 So.2d 321, 324 (Fla. Ct. App. 2004); *Stalley v. ADS Alliance Data Sys.*, 997 F.Supp.2d 1259, 1265-66 (M.D. Fla. 2014) (holding that FSCA applied where "Florida is where words or communications were uttered."); *see also Martucci v. Gonzalez*, 2017 WL 1084522, at *2 (D.N.J. Mar. 22, 2017) (holding that the FSCA had no application where the plaintiff alleged that he was a New Jersey resident and that he was in his New Jersey home when the recording of his calls took place); *Leff v. First Horizon Home Loan*, 2007 WL 1557977, at *1-2 (D.N.J. May 24, 2007) (holding that, where the statements sought to be excluded under § 934.06 were spoken in New Jersey by a New Jersey resident, the FSCA did not apply, even though the recording was made in Florida); *Strusowski v. Nemours Found.*, 2023 U.S. Dist. LEXIS 223389, at *5-6 (E.D. Pa. Dec. 14, 2023) ("This Court will not seek to disrupt Florida courts' determination that the FSCA's aims are best supported by defining interception at the point of the communication's origin. Accordingly, as the Plaintiffs have not alleged that any of the intercepted communications originated in Florida, the FSCA does not apply to these claims . . . .").

Mr. Strickland was not a Florida resident in 2020 – he testified that he lived in Alabama at that time. ECRO at 10:58:55. The only basis to apply the FSCA would thus be that his statements were spoken while he was in Florida. But there is no evidence that Mr. Strickland was in Florida during the April Zoom Videoconference. In fact, on the April Zoom Recording, Mr. Stickland

stated, "we're in the Atlanta office." ECRO at 2:03:50 – 2:04:04. Although this recording would seem to settle the matter, Mr. Strickland testified that this statement simply meant that the Rialto office he worked for was the Atlanta office, and that he could not recall where he was during the April Zoom Videoconference. ECRO at 10:59:12-10:59:55. But RSS has the burden to show that the FSCA applies, and even if the Court accepts Mr. Strickland's testimony, there is no evidence in the record establishing that Mr. Strickland was in Florida when he made the Quoted Statements. RSS has therefore not satisfied its burden to show that the FSCA applies.[24]

And even if FSCA generally applies here, its exclusionary rule does not. Section 934.06 is limited to proceedings in "any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority *of the state, or a political subdivision thereof*, if the disclosure of that information would be in violation of this chapter." (emphasis added). This Court, as a federal court, is not a court of the state of Florida or a political subdivision thereof. *See* 28 U.S.C. § 151. Therefore, by its own terms, § 934.06's exclusionary rule does not apply in this Court.[25]

For all these reasons, the Court finds that Fla. Stat. 934.06 does not bar the admission of the Quoted Statements.

[24] The fact that the PNL states that it is governed by Florida law does not make the FSCA applicable here. *Strusowski* 2023 U.S. Dist. LEXIS 223389, at *5-6 (holding that a Florida choice of law provision "does not make the alleged conduct, which otherwise does not fall within the scope of the statute, subject to the FSCA.").

[25] It is doubtful whether § 934.06's exclusionary rule would apply here even if it purported to apply in federal proceedings. Generally, "evidence lawfully obtained under federal law is admissible in federal courts even though it may possibly be a violation of state law." *United States v. Votteller*, 544 F.2d 1355, 1361 (6th Cir. 1976). Because Mr. Vasani was a participant, he acted lawfully under federal law when he made the Zoom Recordings. 18 U.S.C. § 2511(2)(d) (recording is legal if made by a party to the conversation or with the consent of any party). The exclusionary rule provided by federal law, 18 U.S.C. § 2515, does not require the exclusion of recordings that are lawfully made under federal law because they were recorded by a party (or with the consent of a party) to the conversation. *United States v. Dixon*, 247 F. Supp. 2d 926, 928 (S.D. Ohio 2002).

4. The Court Rejects the Issues First Raised By RSS in the Reply

RSS raises two new issues in the Reply. First, it argues that both the PNL and the underlying loan documents contain provisions stating that any waiver or modification of rights under the loan documents must be in writing. RSS argues that any claim that Rialto had orally agreed not to assert a claim for default interest or late charges is "barred" by these provisions. Reply Mem., 6-7, Dkt. No. 596. In essence, RSS argues that these contractual provisions render the Quoted Statements irrelevant. Second, RSS requests that the Debtors be ordered to turn over to RSS the original recordings of the Quoted Statements. *Id*. at 8. Neither of these issues was raised in the Motion to Strike and both were first raised in the Reply.

Courts are reluctant to consider arguments raised for the first time in a reply brief. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008); *Clark v. Shop24 Global, LLC*, 77 F.Supp.3d 660, 677 n.6 (S.D. Ohio 2015). The Court generally follows this approach, because LBR 9013-1(c) provides that "[t]he reply shall specifically designate the response to which it replies by reference to the docket number. *No additional memoranda will be considered except upon leave of court for good cause shown*." (emphasis added). Given the substantive nature of the additional arguments made in the Reply, this consideration applies with special force here, because the Debtors had no opportunity to respond. *See, e.g.*, *Clark*, 77 F. Supp. 3d at 677 n.6 ("A movant cannot raise new issues for the first time in a reply brief because consideration of such issues deprives the non-moving party of its opportunity to address the new arguments.") (citation modified). The Sixth Circuit has cautioned that trial courts should not resolve issues of substantive law when deciding an evidentiary motion in limine. *Audio Technica U.S., Inc. v. United States*, 963 F.3d 569, 575 (6th Cir. 2020). Parties cannot circumvent this principle by seeking a ruling as a matter of law and then arguing that the ruling renders the opposing party's evidence irrelevant.

Louzon v. Ford Motor Co., 718 F.3d 556, 563 (6th Cir. 2013). And since substantive arguments should not be considered in a motion in limine, such arguments should not be considered when first raised in a reply in support of a motion in limine.[26]

V. Conclusion

For the foregoing reasons, RSS has not met the demanding burden of showing that the Quoted Statements are clearly inadmissible on all potential grounds. *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, 677 F. Supp. 3d 730, 733 (S.D. Ohio 2023). Therefore, the Quoted Statements are admissible at the Claims Objection Hearing, and they will not be stricken from the Claims Objection. The Motion to Strike is therefore DENIED.[27]

IT IS SO ORDERED.

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[26] With respect to the request for an order directing the Debtors to turn over the original recordings to RSS, that request also fails because Bankruptcy Rule 7001(a) requires that a claim for the recovery of property must be pursued as an adversary proceeding. Nor did RSS articulate the legal basis for turnover, nor did it show how it has standing to pursue turnover.

[27] As the Court stated in its oral ruling at the Hearing, to the extent that RSS believes that any other portion of the two Zoom Recordings should be introduced in evidence under the completeness principle set forth in Evidence Rule 106, it may do so at the time that the Debtors introduce the Quoted Statements at the hearing on the Claims Objection. ECRO at 3:58:44 – 3:58:57. After the Court announced its oral ruling denying the Motion to Strike at the Hearing, the parties agreed that the entirety of both Zoom Recordings would be admitted at the Claims Objection Hearing. ECRO at 3:59:00 – 3:59:10.