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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 21-CR-54(DG)

Plaintiff, :

-against- : United States Courthouse
Brooklyn, New York

DAVID GENTILE, JEFFRY
SCHNEIDER and JEFFREY LASH, :

Defendant. : November 19, 2021
2:00 o'clock p.m.

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TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE DIANE GUJARATI
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

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LAURA ZELL, ESQ.

For Deft. J. Lash: ROBERT C. GOTTLIEB, ESQ.
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

1 THE CLERK: Criminal cause for oral argument in
2 docket number 21-CR-0054, United States of America versus
3 Gentile, et al.

4 Please state your appearances for the record
5 starting with the government.

6 MS. ELBERT: Good afternoon, Your Honor. Lauren
7 Elbert, Garen Marshall and paralegal Daniel Youkilis for the
8 United States.

9 THE COURT: Good afternoon to you all.

10 MR. BUCKLEY: Good afternoon, Your Honor. Sean
11 Buckley, Matthew Menchel and Alexandria Swette on behalf of
12 Mr. Gentile who is also seated at counsel table.

13 THE COURT: Good afternoon to you all.

14 MR. COLTON: Good afternoon, Your Honor. Glenn
15 Colton and Laura Zell for defendant Jeffry Schneider who is
16 standing to my right.

17 THE COURT: Good afternoon.

18 MR. GOTTLIEB: Your Honor, good afternoon. Robert
19 C. Gottlieb & Associates by Robert Gottlieb and Paul Townsend
20 and Mr. Lash is here between us.

21 THE COURT: Good afternoon.

22 Everyone may be seated.

23 It's good to see everybody in person. We're
24 convened today for a conference. We were last convened by
25 video about two months ago.

1 Before we take up the pending motions, I want to
2 just get from the parties a status of the case separate from
3 the motions.

4 Ms. Elbert, go ahead.

5 MS. ELBERT: Yes, Your Honor.

6 Since our last conference, the government has
7 substantially completed discovery. We received an incoming
8 request from the defense two days ago for some additional
9 materials that we're going through. To the extent that
10 they've requested some discoverable information that we
11 haven't produced, it's possible that there will be some small
12 additional volume, but other than the firewall materials and
13 any additional materials, we are complete with discovery.

14 THE COURT: And what did the final number come out
15 to be in terms of either the number of documents or number of
16 pages, roughly?

17 MS. ELBERT: I wish I could tell you, Your Honor. I
18 don't have that number offhand.

19 THE COURT: That's fine.

20 MS. ELBERT: Then otherwise, we had a conference
21 with the defense on Wednesday. We understand that they intend
22 to seek a briefing schedule for their next round of more
23 substantive motions and we defer to them for what they want to
24 say on that.

25 THE COURT: Okay. Thank you.

1 Let me turn to the defense. Again, putting aside
2 the pending motions, who wants to take the lead? Maybe
3 Mr. Gentile's counsel or I see somebody rise in the back,
4 Mr. Gottlieb.

5 MR. GOTTLIEB: Thank you very much.

6 Separate from the arguments that are going to be
7 heard today, Your Honor, I represent Mr. Lash and Your Honor
8 may recall that on a number of conferences, virtual
9 conferences, we have pointed out and we've implored the
10 government to turn over specifically notes, 302s, any records
11 pertaining to recordings of telephone calls. And we're
12 talking about telephone calls, Your Honor, between an
13 individual David Rosenberg and specifically my client,
14 Mr. Lash. We have received a number of tapes, recordings. We
15 believe there are approximately eight in number. These are
16 recordings that apparently were initiated by David Rosenberg.

17 David Rosenberg, Your Honor, was an SEC
18 whistleblower. That's how he's been described. He replaced
19 Mr. Lash at the company, at GPB. We know he's going to be a
20 government witness. And the reason why I've been asking for
21 it is that it affects my ability to determine whether or not
22 there's a motion, whether or not there's a pretrial motion
23 that goes to the admissibility of the conversations, of the
24 recordings.

25 Your Honor, it goes without saying, and I'm sure

1 you're sensitive to this, but just to give you a sense is that
2 these recordings between the government witness, an alleged
3 whistleblower, involving my client, we need to know the
4 circumstances of the conversations. We need to know how they
5 came about. We need to know whether or not the agents
6 requested or worked with him to, to make the recordings. We
7 need to know chronologically whether or not all that was done
8 at the time Mr. Lash was already represented by counsel,
9 Your Honor.

10 So at prior conferences, I've raised the issue. I
11 stand here today to say I really need those reports, we
12 believe we're entitled to it, and it's not just that I'm
13 interested in preparing for trial. I'm interested in knowing
14 whether or not there are pretrial motions that are
15 appropriate. Your Honor, just consider that there could be an
16 issue of whether or not it's a one party state consent or two
17 party consent. That would be the underpinnings of a motion.

18 So I raise it today in person and I do so in the
19 hopes that, finally, we can obtain the reports rather than
20 continue to wait.

21 Thank you.

22 THE COURT: If the government chooses to respond,
23 you may. It's not required.

24 MS. ELBERT: Sure. Just briefly, Your Honor.

25 The recordings that have been produced, I'm not sure

1 what reports Mr. Gottlieb is referring to. In terms of his
2 question that he would like to know whether the recordings
3 were made at a time when the client was already represented,
4 the recordings are all dated so he already has that
5 information.

6 I know that the defense had requested documentation.
7 With the FBI, when they have a witness using an FBI recording
8 device, the witness signs a form to reflect that they've
9 received the device. They requested that piece of discovery
10 which we're considering producing to them. In terms of the
11 specifics that were just requested, I'm not very clear on what
12 else in addition to those Mr. Lash's attorney is asking for.

13 THE COURT: All right. That's helpful and I think
14 this is going to be a theme today. The parties need to talk
15 to each other. So if the government is not clear what you're
16 asking for, make it clear and it doesn't have to be here today
17 in court.

18 Is there anything else the defense, any of the three
19 defendants want to raise before I turn to the motions that are
20 pending?

21 MR. BUCKLEY: Just very briefly, Your Honor.

22 One item to flag for the Court is while the
23 government has completed its production as it indicated, it is
24 a voluminous production. It was provided to DupeCoop, I
25 believe, on November 4th so it's going to take us some time to

1 get that production. That's the only thing I was going to
2 flag. We're going to confer with the government to
3 potentially index to correlate this with the earlier
4 production.

5 THE COURT: Thank you.

6 Anything for Mr. Schneider?

7 MR. COLTON: Yes. Your Honor.

8 THE COURT: I'm sorry. It's a little awkward but if
9 you can use the microphone.

10 MR. COLTON: Is that better, Your Honor?

11 THE COURT: It is.

12 MR. COLTON: Sorry about that.

13 I agree with Mr. Buckley that we just recently
14 received a very large production from the government and it
15 takes a while to electronically process it so we don't really
16 know. We understand the government has told us a lot of it is
17 just a repeat, more properly numbered, but we haven't had an
18 opportunity to determine that.

19 There are a large number of important discovery
20 items that we are discussing with the government. I don't
21 think it's necessary unless the Court asks for us to list them
22 but we did send a letter and we are actually in discussions to
23 try to at least limit the number of issues we might have to
24 bring to Your Honor, but there are serious discovery issues
25 there.

1 As far as the -- the only other issue I would raise
2 just to bring it to the Court's attention, at the last
3 conference, I pled with the Court that there was a dispute
4 over Mr. Schneider's right to advancement from the company
5 which would fund the litigation. We tried as hard as we could
6 to negotiate that. We tried to be clever, tried to be
7 creative and we were unsuccessful.

8 GPB is simply taking the position that they won't
9 pay and a lawsuit has been filed in Delaware Chancery Court.
10 It is a summary proceeding, I'm informed by Delaware counsel,
11 and the hope is that a final hearing on that would happen
12 sometime in January. So we're hoping that it doesn't cause
13 too much delay here but I wanted the Court to be aware of
14 what's going on. Of course, I'm not asking the Court to
15 express any opinion on it but it will be something that I will
16 bring up once we talk about what kind of schedule to be on and
17 I'm guessing that that's something we'll do after argument but
18 I wanted the Court to know what I know.

19 THE COURT: Okay. And you're raising this because
20 it potentially affects your involvement in this case, is that
21 right?

22 MR. COLTON: Partially that, but even if doesn't, it
23 will affect the resources available and, therefore, choices
24 have to be made and the motions in this case, when we get to
25 the full-blown set of motions, are going to be voluminous,

1 complicated and lengthy so we're hopeful of not having to make
2 those resource decisions in the absence of knowing what
3 resources Mr. Schneider has to put towards his defense and
4 that's why we filed a summary proceeding. We're told Delaware
5 courts typically do deal with those in a quick fashion and, of
6 course, we're going to attempt to work it out until the day
7 the decision comes.

8 THE COURT: Thank you.

9 Does the government want to comment on anything
10 you've just heard?

11 MS. ELBERT: No, Your Honor.

12 THE COURT: Okay. Why don't we turn now to the two
13 pending motions, the defendants' Rule 12 motion and the
14 government's Rule 502(d) motion.

15 I'd like to take up the Rule 12 motion first and I'd
16 like to hear, it's just the two defendants who made this
17 motion but I'd like to hear you out fully and I want to have
18 you thinking about what I'm thinking on this before you start.

19 I want to know more specifically what exactly you're
20 asking for and why your motion is not premature. I want to
21 know what authority you have that suggests that the Court
22 should grant the type of relief that you're asking for at this
23 early stage of the case. If there are any analogous cases
24 that you can point to, I'd be interested in hearing about
25 those. I also want to understand better, and some of this is

1 hinted at a bit in the briefing, but what efforts were made to
2 resolve your disputes with the government prior to filing your
3 motion.

4 I think at pages 6 and 7 of the government's
5 response, they indicate that you had not asked for certain or
6 asked them whether they intended to introduce certain evidence
7 before you filed your motion. I just want to hear you fully
8 out on what happened before the filing of the motion in terms
9 of defense interactions with the government on these issues.
10 I will have more questions but I wanted you to have that in
11 mind when you start.

12 Mr. Colton, are you going to start? You're rising.

13 MR. COLTON: For the team, I guess, Your Honor.

14 THE COURT: Okay.

15 MR. COLTON: So just to take the Court's two initial
16 questions. First, there was an attempt to work this out in
17 advance. Mr. Gentile's lawyer wrote a letter. We then joined
18 that letter seeking the information that would be granted in a
19 Rule 12(b)(4)(B) motion. The government rejected that
20 request. Many of the specific things that we are seeking are
21 things that we asked the government before in advance.

22 So we asked them if they would be willing to, in
23 what a 12(b)(4)(B) granting would give, what exhibits, what
24 evidence that's admissible under Rule 16, excuse me, that's
25 discoverable under Rule 16 are you seeking to admit in your

1 case in chief so that we can determine what we might need to
2 move to suppress. It's more than just the material that was
3 gotten through a search warrant or recording. It's also the
4 fruits, of course, of those searches or recordings if it turns
5 out there's some unconstitutional behavior in that regard. So
6 we tried to work that out and the government surely knew that
7 we were making this motion because we jointly proposed the
8 motion schedule.

9 Rule 12(b)(4)(B) is clear in what it says. It says,
10 in essence, that you can request, and we did, that the
11 government detail what evidence it's going to seek to admit in
12 its case in chief that is potentially subject to a motion to
13 suppress. The only limitation placed on there is the
14 information, the evidence has to be discoverable under Rule 16
15 which is a very limited limitation because it's anything, as
16 the Court is well aware, that is either material to the
17 defense or something the government plans to put in its case
18 in chief.

19 So I would submit, Your Honor, that we did have the
20 discussion. It doesn't mean we're not willing to have further
21 discussion but we certainly did have the discussion. And one
22 of the critical areas Mr. Gottlieb already brought out. We
23 don't have the information regarding hundreds of recordings.
24 We don't have the information about how they were made, what
25 was the government's involvement, what was the SEC's

1 involvement, was DOJ and SEC coordinating on those, what
2 happened in the recordings made by their cooperating witness
3 and what was the involvement of the government in that. All
4 of that information goes to the question of legality of the
5 recordings.

6 So we believe we did vet this but we are in no way
7 ruling out having further discussions to try to limit the
8 number of issues the Court may need to decide. Until a
9 decision is rendered, we're always happy to try to work out
10 some or all of a motion.

11 As far as the case law, Your Honor, we listed a
12 whole number of cases in our brief: The Fell case from
13 Vermont, the de la Cruz-Paulino case, the Montague case.
14 There are a number of cases more in the Western District than
15 in this District, candidly, that deal with the granting of a
16 Rule 12(b)(4)(B) motion.

17 THE COURT: But do any of them deal with that at the
18 early stage of the case or are they closer to trial? Is there
19 anything really analogous to what the situation is here is
20 what I'm asking. Of course I've looked at your papers and am
21 familiar with what you cited.

22 MR. COLTON: So the answer is it's not always clear
23 from the relatively short opinions of the 12(b)(4)(B) motion
24 because, typically, the opinions are on a litany of motions,
25 12(b)(4)(B) being one of them. So I can't represent to the

1 Court that they're precisely analogous but I will say that
2 this is the perfect case in my mind for the early 12(b)(4)(B)
3 relief.

4 This is a case that the government estimated
5 13 million documents of discovery which the government admits
6 they haven't reviewed, the government admits there's been no
7 Rule 16 cut of that, all of that has been sent to the defense,
8 and you have a case where you have many, many issues that
9 could lead to suppression in the case.

10 It's not only five search warrants and the fruits of
11 those warrants. It's not only 200 recordings and the fruits
12 of those recordings. It's wiring up a cooperator and putting
13 the cooperator into legal meetings after the investigation
14 started. It is forcing individuals to make a Hobson's choice
15 between testifying for the SEC or giving up their career and
16 their livelihood.

17 There's a whole litany of potential suppression
18 issues here, Your Honor, together with the fact that we can't
19 really determine what it is the government is seeking to admit
20 into evidence because we have 13 million documents and no
21 evidence that even most of those would be producible under
22 Rule 16, nevertheless under which rule of Rule 16.

23 To be clear, we're not saying the government has an
24 obligation to give us these Bates numbers for this part of
25 Rule 16 and these Bates numbers of this part of Rule 16. We

1 are saying that if you don't make a Rule 16 cut, that defense
2 the government uses to a 12(b)(4)(B) is not available.

3 I hope that addresses the Court's questions, initial
4 questions.

5 THE COURT: Yes. Go ahead.

6 MR. COLTON: Your Honor, again, I would say that
7 this is the perfect case for this type of a granting of a
8 motion because under Rule 12(b)(4)(B) it's supposed to be both
9 fairness issues and a procedural and efficiency issue.

10 If we know which recordings or what evidence came
11 from the recordings, the government is going to seek to admit
12 them. If we know which documents from the search, not just
13 what they say is responsive, but which documents from the
14 searches and what the fruits of those searches they seek to
15 admit, then we can make a determination is it worth moving to
16 suppress is there a real suppression motion to make. Without
17 this relief, the suppression motions will be very wide-ranging
18 and very voluminous and they may be necessary anyway, I can't
19 promise the Court they wouldn't, but the hope is that it would
20 be limited somewhat by understanding what it is that the
21 government is seeking to admit or not admit in its case in
22 chief.

23 THE COURT: I'm going to interrupt.

24 You focused on efficiency which I'm really glad to
25 hear, it's always very important, but what struck me as not

1 particularly efficient when I was reading the parties' papers
2 was that there appears to be in the briefing some negotiation
3 going on among the parties in the context of the briefing and
4 I was really struck by that because it seems to me much more
5 efficient for the parties to have been talking to each other,
6 sort of narrowing down the issues and resolving as much as
7 they could, instead of the back and forth in these properly
8 filed briefs to negotiating what's going to be turned over and
9 what categories may or may not be relevant.

10 So I leave you with that thought about efficiency
11 and perhaps talking to the government rather than in your
12 submissions trying to negotiate.

13 MR. COLTON: Well, Your Honor, we have had
14 discussions. Just a perfect example is what Mr. Gottlieb
15 brought up. It has been more than half a year of trying to
16 get from the government the circumstances of wiring up or
17 getting the recordings, what the government's involvement was,
18 what instructions the government gave to avoid invading
19 privileged discussions. All of that is old and we simply
20 don't have it and if we don't have it, then we have no choice
21 but to move to suppress and ask Your Honor to order this
22 information, but if the government is saying none of the
23 recordings -- I'm making this up -- none of the recordings of
24 Rosenberg are coming in, okay, maybe there's no need to
25 suppress.

1 So when they tell us under Rule 12(b)(4)(B) this is
2 what we intend to admit under this rule, we can make an
3 efficiency determination. We don't have that. We have --
4 and, again, I am in no way ruling out further discussions. We
5 are very happy to do that and if we can get a resolution or
6 50 percent of a resolution, we'd be happy, I'm sure Your Honor
7 would be happy, and so we're willing to do that, but it's not
8 like we haven't done the negotiation and haven't had the
9 discussion previously.

10 Just to address some of the other issues, the
11 government throws out a number of defenses to this motion that
12 I think could be easily just swatted aside. Whether the
13 defendants also had a parallel SEC investigation and engaged
14 in a Wells Process has nothing to do with the government's
15 obligations under Rule 12(b)(4)(B) or any rule of criminal
16 procedure. Whether the defendants have skilled or not skilled
17 counsel or funded counsel or not funded counsel are irrelevant
18 to the question of the government's obligations under the
19 Federal Rules of Criminal Procedure.

20 Moreover, the Rule 16 cases the government cites are
21 about different issues. We are not litigating the
22 government's obligation under Rule 16 in this motion. There
23 may be Rule 16 motions but they're not here. The only
24 relevance to Rule 16 within 12(b)(4)(B) is does it provide the
25 government a defense.

1 So there are some cases where there's so little
2 documentation, that there's no need for relief, the government
3 has done such a lengthy job of parsing the evidence and
4 producing material, that there's no need for the 12(b)(4)(B)
5 motion. Here the government has not done that at all and they
6 seem to admit they did no Rule 16 cut. So if they did, we'll
7 hear it here, but it doesn't seem like they did.

8 Lastly, I would say the idea that this is a case
9 where discovery is typical, I would dispute. There was
10 nothing typical about this case, Your Honor.

11 I have not been involved in a case where the
12 government has just produced over 10 million documents without
13 doing a Rule 16 review. I have not been involved in a case
14 where there's an allegation that the government wired up
15 somebody and put them into a legal meeting. I have not been
16 involved in a case, in a white collar securities case where
17 the government sends a grand jury subpoena in December of
18 2019, there's no discussion whatsoever, and there's an arrest
19 in February of 2021. I've never been involved in a case
20 where, albeit not in this District, the court takes the
21 position that all defendants, even if they are arrested at
22 6 o'clock in the morning, must spend a night in jail which is
23 what happened to Mr. Schneider.

24 So there is absolutely nothing in my mind that's
25 typical about this case and that's why, maybe a 12(b)(4)(B)

1 motion is not typical, but this is not the typical case.

2 THE COURT: Thank you, Mr. Colton.

3 MR. COLTON: Thank you, Your Honor.

4 THE COURT: Mr. Gottlieb or one of your colleague?

5 MR. BUCKLEY: Nothing to add to that, Your Honor.

6 THE COURT: Let me turn to the government on this
7 Rule 12 motion and I'll hear you fully but I do want you to
8 address, in your papers, you indicate that you think the
9 dispute between the parties that forms the basis of this
10 motion can likely be resolved without Court intervention and,
11 again, there was some negotiating, it looked like, in the
12 context of the motion papers but what does the government
13 propose will happen that could resolve this motion without
14 Court intervention?

15 MS. ELBERT: Sure.

16 So I think in our view, the trouble with this motion
17 is that the defense is choosing to play their cards very close
18 to the vest and say they might have a basis to suppress
19 essentially any piece of evidence in this case and so,
20 government, you have to provide us with notification of each
21 piece of evidence you intend to introduce so we can consider
22 whether we want to suppress it. That's not what the law
23 provides under Conyers. The defense is supposed to alert the
24 court and the government to what evidence they might be
25 seeking to suppress more specifically.

1 You know, Mr. Colton referred to the fact that the
2 defense has sent us a letter prior to filing this 12(b)(4)
3 motion, but in that letter, they essentially asked us to
4 identify what documents in the discovery and what witnesses we
5 intended to introduce at trial. They didn't break it out into
6 the categories that were included in their 12(b)(4) motion.
7 That was the first time that they made a request for those
8 specific categories. So, for example, if the defense asked me
9 did you use a mail cover in this case, I would have been happy
10 to alert them that no, we did not, before coming to the Court
11 but they should have already known that since there was no
12 mail cover evidence produced.

13 Even just hearing Mr. Colton's remarks today, he
14 provided a bit more insight than what is in the motion as to
15 what exactly they're considering moving on. If he's
16 considering moving on recordings prepared by Mr. Cohen who was
17 a compliance professional who attempted to cooperate with the
18 government and made some recordings in the course of that
19 effort, that's a specific category of discovery and we can
20 consider what additional detail we can provide as to that, but
21 to ask that the government identify which of the documents
22 we've returned responsive from the search warrant that we
23 intend to introduce at trial goes well beyond the scope of
24 what would be reasonable relief in anticipation of a
25 suppression motion.

1 We've alerted them that we intend to introduce
2 documents from the search warrants. They can make their
3 decision whether or not they wish to move to suppress those
4 search warrants, but we shouldn't be required to essentially
5 identify our exhibits at this early stage of the case.

6 So I think in my view, the more specifically they
7 can ask us about what categories of evidence they're
8 considering moving to suppress on, the better I would be
9 equipped to answer their questions, but I'm not in a position
10 to turn over an exhibit and witness list at this stage of the
11 case.

12 THE COURT: Thank you. Is there anything more you
13 would like to add?

14 MS. ELBERT: I guess I'll just note in terms of
15 Mr. Colton's remarks about the volume of discovery in this
16 case and the allegations that we failed to conduct a Rule 16
17 review as he terms it, we did produce essentially our
18 investigative file for the most part. We've produced all the
19 subpoena returns we received. We produced the entire SEC
20 investigative file. We always err on the side of
21 over-production and I don't think there's anything nefarious
22 in that being our practice. Case in point, you know, two days
23 ago, the defense sent us a letter asking for the entire SEC
24 investigative file which we've already produced and which
25 comprises almost 70 percent of the total discovery in this

1 case.

2 So the defense can't have it both ways, where
3 they're sending us letters every week asking for additional
4 materials and then complaining about the volume of materials
5 that we're turning over, but with that, we'll just rest on our
6 submission.

7 THE COURT: Okay. I want to turn to your motion
8 now --

9 MS. ELBERT: Sure.

10 THE COURT: -- Ms. Elbert, and I have some specific
11 questions there. It really relates to Rule 502(d) itself.

12 That rule seems to be much more limited than the
13 relief that you're seeking here. So in your briefing, you
14 appear to be asking for relief beyond just an order stating
15 that a disclosure or production will not waive the privilege
16 or protection.

17 So what authority do you have for the broader relief
18 that you appear to be asking for in the context of a
19 Rule 502(d) motion?

20 I mean, for example, what authority do you have for
21 requesting that the Court determine whether you have a
22 disclosure obligation with respect to any particular
23 materials? I mean, how at this stage, on the very limited
24 record that is before me, would I even make that determination
25 and is that even an appropriate determination to make under a

1 rule that is really designed to make sure that the privilege
2 is not waived with respect to certain materials that you
3 decide you are going to produce?

4 MS. ELBERT: Your Honor, I don't, I don't have a
5 case to cite to you that's exactly analogous to these
6 circumstances.

7 We did, in a prior case, under very similar
8 circumstances where the FBI executed a search warrant on a
9 corporate entity and then we charged individual defendants, we
10 obtained a protective order along the lines of what's been
11 proposed and that was on consent of the parties. I haven't
12 found a case where this issue has been directly litigated
13 under analogous circumstances.

14 I don't have a case to point you to, but I think the
15 relief that we're asking for is essentially the order that
16 would grant that our providing these materials would not waive
17 the privilege of any party. It's our --

18 THE COURT: Your briefing goes well beyond that,
19 doesn't it? It suggests that the court should be making
20 determinations as to what your disclosure obligations are at
21 this point. Is that what you intended to be arguing?

22 MS. ELBERT: Well, I think our primary request for
23 relief is we would like to turn it over. We would like to
24 say, you know, that in our view, the safest course to make
25 sure that we've covered all of our disclosure obligations

1 would be to just produce these materials, but in order to do
2 that, in respect to anyone's privilege interest that they may
3 have in them, we would like to do so pursuant to an order
4 providing that our producing these materials would not waive
5 privilege.

6 In the alternative, if this is what Your Honor is
7 driving at, there is case law suggesting that where documents
8 have been segregated outside the possession of the prosecution
9 team, the government doesn't have any obligation pursuant to
10 Brady or other disclosure obligations to produce those
11 materials.

12 I think that is the circumstance here. These
13 materials have been segregated outside the possession of the
14 prosecution team, we do not have access to them, we have not
15 reviewed them, and it appears, based on that case law, that
16 the Court would be empowered to say since they're
17 categorically not in our possession, we don't have an
18 obligation to disclose them.

19 THE COURT: Tell me what term are you using. Are
20 you using filter team, firewall team?

21 MS. ELBERT: Firewall team.

22 THE COURT: What is your firewall team doing? And I
23 don't mean with respect to specific content.

24 MS. ELBERT: Sure.

25 THE COURT: Just tell me what is their role. Are

1 they merely a repository for this information? Are they doing
2 any analysis or screening?

3 MS. ELBERT: So they're essentially a repository for
4 this information. Given the nature of the filter screen that
5 we applied in this case where we ran search terms relating to
6 attorney names and e-mail addresses and things of that nature,
7 we've made the assessment that it's very unlikely there's
8 going to be nonprivileged material in there that's going to be
9 useful to the prosecution team.

10 So often, in certain circumstances, our office will
11 ask a firewall team to conduct a review to see if there are
12 documents that can put over the wall and be available to
13 prosecution team. We elected just as a matter of resources
14 not to ask the firewall team to undertake that effort in this
15 instance and we're not obligated to. There's no law
16 suggesting that the government is obligated to review each and
17 every document it obtains in the course of a search.

18 So they're essentially just maintaining custody of
19 these materials and interfacing with defense counsel on any
20 issues that they have relating to the firewall side of things.

21 THE COURT: That's helpful to know. Thank you.

22 MS. ELBERT: Yes.

23 So I'm happy to answer other questions that the
24 Court has and I think we are here genuinely seeking guidance
25 from the Court. The firewall team --

1 THE COURT: That's the part that I think I have an
2 issue with here because I'm not sure, in the context of a
3 502(d) motion, what kind of guidance are you looking for.

4 I mean, the motion is seeking protection for
5 whatever you decide you're turning over, to not have that
6 constitute a waiver. So what's the guidance you're looking
7 for, whether you have to turn something over? That's the part
8 that I think you are going beyond the rule.

9 MS. ELBERT: Sure.

10 THE COURT: I want you to explain to me what exactly
11 you're looking for and what, the guidance that you're looking
12 for.

13 MS. ELBERT: Sure. So the guidance we're looking
14 for is we're kind of stuck between two competing obligations.
15 We perceive that we, and consistent with our practice
16 throughout this case and consistent with our practice in the
17 office generally, we're in possession of potentially relevant
18 information, we would like to produce that information.

19 Mr. Lash has requested that information, the primary
20 privilege holder, if not the exclusive privilege holder. GPB
21 has said they do not object to our providing that information,
22 but we have two defendants who essentially object to the
23 information being produced. So we have a conflict between
24 what Mr. Lash has requested, for example, and what Mr. Gentile
25 and Mr. Schneider have requested that we do with that

1 information.

2 So what we're seeking guidance from the Court on is
3 whether the Court would be willing to enter the 502(d) order
4 in which case, we would be able to pursue the course that
5 makes us most comfortable.

6 You know, in some ways, as a prosecution team, we
7 have a limited interest in the outcome of this motion, that
8 this evidence is not going to be made available to us, it's
9 being made available solely to the defendants and the
10 possibility that it would help them prepare their defense. So
11 that would be our preference, but to the extent the Court
12 believes that Mr. Gentile and Mr. Schneider have a standing to
13 object to the provision of these documents and that they
14 should have some opportunity to be heard and prevent their
15 disclosure, then we would ask the Court to issue a ruling
16 saying that given that these materials are not in the custody
17 of the prosecution team, we don't have an obligation to
18 produce them.

19 THE COURT: You think that's a 502(d) motion?

20 MS. ELBERT: The secondary relief is not a 502.

21 THE COURT: Right. That's the part I'm having an
22 issue with. You brought a 502(d) motion that seems to be much
23 broader in what you're seeking than that. So that's --

24 MS. ELBERT: Understood. We're seeking two forms of
25 relief in the alternative. Our primary goal would be to

1 produce these materials under a 502(d), but if the Court is
2 not inclined to grant that protection to these materials, we
3 would ask the Court to issue an order saying that we're not
4 obligated to produce them because right now, we're sort of
5 stuck where we can't produce them and we can't not produce
6 them. So we need some guidance from the Court.

7 THE COURT: Doesn't the government all the time make
8 decisions about whether it's going to disclose or not disclose
9 without the court's involvement?

10 MS. ELBERT: Sure. This is the first time I had
11 defendants tell me they don't want me to produce something. I
12 haven't encountered this situation before.

13 I planned all along just to handle this case where
14 we've done it in other cases where the parties simply agree to
15 a protective or a non-waiver of privilege, we submit it to the
16 court jointly, it's so ordered, and we produce the materials.
17 So, yes, it would be in our purview to elect to produce them,
18 however, I think that the smartest course and the course
19 that's consistent with what GPB has asked us to do would be to
20 have those produced pursuant to a 502(d) order provided that
21 there is no waiver of privilege so they can't be used in
22 subsequent litigation under the claim that the privilege had
23 been waived.

24 So you're correct, Your Honor, it would be our
25 preference to just produce them, but we're trying to be

1 cautious in view of the competing interests in play.

2 THE COURT: I mean, just take a look if you have
3 your proposed order there handy.

4 MS. ELBERT: Sure.

5 THE COURT: Paragraph 1 of the proposed order would
6 have me ordering that you produce to all defendants on a
7 rolling basis certain materials.

8 Now, what position is the court in at this point,
9 having seen none of these materials at this early stage with a
10 limited record, to tell you something other than if you
11 produce certain materials, they will not, they will not
12 constitute anybody's, you know, waiver. Unless this is just
13 the drafting of this. This strikes me as --

14 MS. ELBERT: It's our intention to produce these
15 materials so you're correct that I suppose the Court wouldn't
16 have to directly order it and you can certainly wordsmith it,
17 if that's --

18 THE COURT: This almost strikes me as this was
19 designed to be some sort of stipulation and it got --

20 MS. ELBERT: That's correct.

21 THE COURT: -- turned into something that says it's
22 an order but it goes beyond what a 502(d) order, I think, is
23 really designed for.

24 MS. ELBERT: Okay.

25 THE COURT: That's what I'm highlighting for you for

1 your consideration.

2 MS. ELBERT: This proposed order did start out as a
3 stipulation that was extended to GPB as well as the
4 defendants. The defendants obviously declined to sign it
5 other than Defendant Lash. We attempted to rework it. GPB
6 has weighed in on it multiple times. So it's a bit of a
7 product of multiple rounds of changes.

8 So if the Court's preference would be just to have
9 it more narrow, we could specifically define the materials
10 that are to be produced by Bates number, I suppose, and have
11 the order just merely state the part about the 502(d). That's
12 easy enough for us to accomplish.

13 THE COURT: Okay. Let me turn to your adversaries
14 to hear them out on this particular motion.

15 Let me start by asking you whether you understand
16 what the government is asking for here in terms of this
17 motion.

18 MR. BUCKLEY: Yes, Your Honor. To answer that
19 question, my understanding of what the government is asking
20 for here is permission to produce, sight unseen, 146,000
21 potentially privileged documents over which, on behalf of my
22 client, we believe he has individual standing to assert
23 privilege claims and the government is asking for permission
24 and the Court's blessing to take those privileged documents
25 and provide them to co-defendants who do not necessarily share

1 that privilege and who are not entitled to the contents of
2 those privileged documents.

3 So I think that's the most direct answer to
4 Your Honor's question. They haven't, as typically is done,
5 done any review to determine responsiveness as far as those
6 materials are concerned, to make a determination as to whether
7 it potentially could trigger a Brady obligation, and then
8 given us an opportunity to seek an order from the Court as to
9 why, if either of those circumstances exist, it should not be
10 turned over on the basis of privilege.

11 Does that answer the Court's question?

12 THE COURT: It does. It does.

13 Is there anything else you would like to say?

14 MR. BUCKLEY: Yes, Your Honor. A number of things,
15 actually.

16 THE COURT: Yes.

17 MR. BUCKLEY: So with regard to Ms. Elbert's
18 statement that this is the first time she's heard of
19 defendants saying that they don't want something produced, I
20 find that to be a strange statement particularly given that
21 one of the cases cited in our opposition brief is the Metter
22 case involving Judge Irizarry where the government proposed to
23 do exactly what they're suggesting here which is turn over
24 materials seized, materials seized in which a single defendant
25 had a privacy or privilege interest, turn those over, sight

1 unseen, to other defendants. Judge Irizarry, rightfully so,
2 took problem with that, took issue with that. So that case
3 alone is an example of why the procedure that they are
4 proposing that the Court adopt is inappropriate.

5 In addition to that, the issue here is not that
6 these are documents that everybody has a right, title or
7 interest in such that the defendants, all three of us, share
8 an interest or privacy interest, really, in the documents.
9 These are documents that are privileged or have triggered
10 privilege concerns that at least Mr. Gentile and Mr. Schneider
11 joined in our motion believe that we have legitimate privilege
12 interests in, we would like to assert those privileges if this
13 procedure is going to be adopted and litigate the privilege,
14 but I think the safest course of action or the safest path
15 here is to return the privileged documents back to GPB.

16 I know Ms. Elbert said that GPB had asked that the
17 502(d) order be put into place. That's not the case. GPB
18 sent us both a letter on Wednesday clarifying exactly what
19 transpired. Ms. Elbert approached GPB and indicated to GPB
20 her intention to proceed to produce 146,000 potentially
21 privileged documents, sight unseen, to the defendants. She
22 indicated to GPB that she felt she had an obligation to do so,
23 it's unclear what exactly that obligation is to this date, and
24 then asked GPB if they would like her to seek a 502(d) order.

25 So, in view of that, the question here is are they

1 actually in possession of these materials. As Ms. Elbert
2 notes, there is case law that says that privileged materials
3 are not properly seized so as far as --

4 THE COURT: There's case law stating otherwise,
5 isn't that correct as well?

6 MR. BUCKLEY: That is correct, Your Honor.

7 So as far as being torn between those obligations,
8 we think that the case law allows them to return the
9 privileged materials to GPB, but the issue with what she's
10 proposing or what the government is proposing here is that
11 once those materials go across the transom, once they are
12 provided to all three defendants, you can't un-ring that bell.
13 The information is out there. And that is, you know, one of
14 the core concerns that In Re: Dow talked about as far as
15 making sure that courts should not compel parties to produce
16 privileged materials.

17 THE COURT: But that's -- let me stop you there and
18 I'll hear you, I'll let you continue, but that's the issue I'm
19 having here, what am I being asked to do here.

20 If I am being asked to, if the government is asking
21 me to decide for them whether they have to disclose something,
22 that's a very different ask than if they are just asking,
23 they're going to make their own decisions and then they are
24 asking the Court to issue an order under 502(d) merely stating
25 that whatever they are turning over will not waive anyone's

1 privilege. Right?

2 You would agree these are two very different things,
3 right?

4 MR. BUCKLEY: I certainly do, Your Honor, and I
5 think those two questions have merged and is part of what is
6 causing the confusion in the briefing here and I would
7 actually put it slightly differently, if I may, Judge.

8 I think what the government is asking this court for
9 permission to do is to abrogate its responsibility to conduct
10 a review of these materials, if it feels that it is, in fact,
11 in possession of these materials, to abrogate its
12 responsibility to review them for responsiveness or
13 exculpatory value and, instead, have the Court bless a whole
14 turnover of all of the materials without any review being
15 done.

16 THE COURT: Anything else?

17 MR. BUCKLEY: Well, I mean, that's the core concern
18 that Hall highlighted when asked for the same relief and Hall
19 referred to it as letting the proverbial cat out of the bag.

20 Then just to go back to Your Honor's original
21 question to Ms. Elbert as far as is there any precedent for
22 this, is this a proper use of 502(d), we submit it is not and,
23 as the Hall court noted, 502(d) is limited to those privileged
24 and protected materials disclosed inadvertently or purposely
25 by the actual holder of the privilege and production. That is

1 not the situation here. These materials were seized and these
2 are materials that at least Mr. Schneider and Mr. Gentile
3 believe they have valid privilege interests in.

4 The cases that the government cites, Sattar and
5 Paulus and others, don't apply here because Sattar, in
6 particular, that was a situation where Judge Koeltl in
7 determining to do an in camera review of a very limited subset
8 of privileged materials, Judge Koeltl explicitly found that
9 none of the defendants in that case had a valid privilege
10 claim in those materials.

11 So the cases they cite are inapposite, the relief
12 they seek is not contemplated by the rule and we would submit
13 that the material should be returned to GPB.

14 THE COURT: Mr. Colton?

15 MR. COLTON: Your Honor, just very, very briefly.
16 We agree with the arguments made by Mr. Buckley on behalf of
17 Mr. Gentile. If I could just speak to a couple of issues
18 specifically related to Mr. Schneider.

19 First, there is, the government questions in the
20 papers whether --

21 THE COURT: Sorry. I'm going to ask you, again, if
22 you could speak into the microphone.

23 MR. COLTON: Is that better?

24 THE COURT: It is. I think the technology issue on
25 this is on our end.

1 MR. COLTON: A pandemic and masks, to say they can't
2 hear me, we've achieved something.

3 Your Honor, briefly, we agree with the points made
4 by Mr. Buckley on behalf of Mr. Gentile and just a couple of
5 issues related specifically to Mr. Schneider.

6 First, the government challenges whether
7 Mr. Schneider even has any standing to object. There
8 absolutely, unequivocally was a common interest and is a
9 common interest involving GPB, Mr. Gentile and Mr. Schneider.
10 The government gives it the back of the hand but they're
11 simply wrong.

12 Factually, Mr. Dibre, who is going to be a big
13 figure in this case potentially, filed a counterclaim against
14 Mr. Gentile and GPB making all sorts of allegations against
15 Mr. Schneider and Mr. Gentile in March of 2018, almost a whole
16 year before the search warrants to GPB were issued here. So
17 there was most definitively reasons to have a common interest
18 and the existence of a common interest. So we urge the Court,
19 at a minimum, not to accept the government's representation
20 that there can't be a common interest.

21 Second, the government says that Mr. Schneider never
22 bothered to provide names of attorneys or search terms and
23 that's simply not so. When it came out that there was a
24 search warrant related to what the government asserts is
25 Mr. Schneider's gmail account, we provided a substantial list

1 of names. Whether the government applied those to the GPB
2 search or not, we don't know, but we provided that
3 information.

4 And third, Your Honor, I think it's important to
5 note that in arriving at these 146,000 potentially privileged
6 documents, the government went about the search backwards.
7 According to the government, they ran the privileged search
8 terms through the database before the responsiveness search
9 terms. So what they're proposing to do is produce irrelevant,
10 not even called for by the search warrant issued by the Judge,
11 documents that hit on privileged terms because they ran them
12 first. The import of that is there could be hundreds of
13 reasons to get legal advice or to have other privileges that
14 might apply that aren't related to what was in the search
15 warrant and what the search warrant authorized the seizure of.

16 Finally, I'll just say this. What the government is
17 really asking for is an order that says any time material is
18 voluminous and it's hard to review, even if they don't know or
19 even if they can't make a proffer that there is responsive or
20 constitutionally mandated material being produced, they should
21 be allowed to produce all the privileged information
22 irrespective of whether the privilege holders object or not.

23 And, finally, I would say, I'd ask the Court, at a
24 minimum, not to accept their representation that GPB has
25 approved or requested this order and take a look at the letter

1 they wrote to both sides so you could see GPB's actual
2 position.

3 Thank you, Your Honor.

4 THE COURT: Thank you.

5 Any response, Ms. Elbert?

6 MS. ELBERT: Just very briefly.

7 To the extent that I misstated GPB's position in my
8 oral arguments, that was not intentional. I didn't mean to
9 suggest that they had a position on whether we produce these
10 materials or not. It's just that they had a position as to
11 whether we produce them or produce them pursuant to a 502(d)
12 order and they don't object to the entry of a 502(d) order.
13 It's not the case that they have taken the position that we
14 must produce them or not produce them. I think they're
15 agnostic on that point.

16 As to Mr. Colton's comments regarding the relief
17 we're seeking being some excuse not to review voluminous
18 material, I think it's important to note in the first instance
19 that the search warrant conducted here was conducted on a
20 non-party to this matter. We're talking about a corporate
21 entity. This isn't a search of somebody's personal e-mail
22 address or personal computer. And in this instance, we're
23 talking about materials that hit on privileged search terms.

24 It is possible that one or more of the defendants
25 might wish to raise an advice of counsel defense in this

1 matter and if we are going to rely on subject matter search
2 terms to ascertain what is or isn't relevant, it just
3 introduces the risk of something important being missed.

4 It is difficult in any case but particularly in a
5 complex fraud case for the government to anticipate what
6 defenses the defendants may wish to bring and to identify with
7 great confidence all material that might be useful to them.
8 That's just, it's a difficult task which is part of the reason
9 why we tend to overproduce. Obviously, to the extent we
10 identify things that we know will be useful to the defense,
11 we'll identify them to them and disclose them, but we would
12 like to produce what we have just in case there's a difference
13 of opinion about what defenses the defendants wish to bring.

14 So it's not as though we're trying to shirk work by
15 asking for this order. It is truly to be consistent with our
16 practice and make sure that we are producing anything that
17 might be useful to any of the defendants and in this case,
18 particularly, Mr. Lash.

19 THE COURT: Thank you.

20 Go ahead, Mr. Buckley.

21 MR. BUCKLEY: Thank you, Your Honor. Just very
22 briefly.

23 I wanted to address the point about these being
24 seized from a third party. Just to clarify, I know Mr. Colton
25 did with regard to Mr. Schneider, but I didn't think

1 Your Honor was asking me questions about the propriety of the
2 assertion of various privileges and whether it's waived or
3 not, but if that is a question that is important for the
4 Court's determination, and I don't think it should be, I'm
5 happy to address the various ways in which --

6 THE COURT: No. You're correct that I wasn't asking
7 that because I do think that is beyond the scope of the motion
8 that was made by the government at this stage. So that's -- I
9 think there's a bit of a disconnect here, but I think
10 Ms. Elbert has acknowledged that maybe what the papers suggest
11 the government is seeking by way of relief may not actually be
12 what you are intending to be seeking.

13 Is that right, Ms. Elbert, in terms of a 502 motion?

14 MS. ELBERT: In terms of the 502 motion, we are,
15 we're seeking to produce everything that hit on our privileged
16 search terms pursuant to an order providing that our
17 production of that won't result in a waiver.

18 THE COURT: But it's only the second part of that
19 that you're asking the Court to be involved in.

20 MS. ELBERT: Correct.

21 THE COURT: Not the part about whether you make
22 those disclosures.

23 MS. ELBERT: Right. We would like to produce it.
24 We just need an order reflecting that our production of it
25 won't trigger a waiver is the relief that we're seeking.

1 THE COURT: So let me turn back to the defense now.
2 Is there not a stipulation here that can be entered
3 into that you would be comfortable with simply saying that
4 whatever is produced that potentially has, you know, should be
5 privileged and protected is not going to be, you know, waived
6 because of it?

7 Regardless, the government is going to make whatever
8 decisions on disclosure it makes and that might be the subject
9 of different types of motion practice, but in terms of the
10 502(d) motion, is there any way the parties can agree of any
11 aspect of what an order might look like there?

12 MR. BUCKLEY: Your Honor, I hesitate to say never
13 but my instinct or the reason that we have taken the position
14 that we've taken is a 502(d) order is not appropriate to allow
15 the government to produce materials that it seized pursuant to
16 a search warrant to a third party who does not share my
17 client's privilege.

18 So a 502(d) order, even if it says we all agree that
19 this will not constitute a waiver of privilege, if it is a
20 document or an e-mail that Mr. Gentile has an individual
21 privilege interest in, our point is neither Mr. Schneider nor
22 Mr. Lash should see that document.

23 THE COURT: But the 502(d) order is not an order
24 that would be directing or even blessing any particular
25 production; it would simply be saying what the effect of that

1 production is on a waiver, correct?

2 MR. BUCKLEY: That is typically the way a 502(d)
3 order functions. What the government is asking for here is to
4 produce 146,000 documents, sight unseen, without disclosing to
5 the parties what those documents are so that we can assert
6 privilege.

7 THE COURT: But isn't that outside of the 502(d)
8 analysis that I have to undertake at this point?

9 I don't think anybody is really saying something
10 different. What I'm trying to figure out here is I have a
11 motion before me to sign off on a proposed 502(d) order. I've
12 already raised some issues with the government about
13 particular language in the order, but is there not an
14 appropriate order that the government could present that
15 doesn't touch on these issues that you're concerned about,
16 about essentially the Court either ordering or blessing the
17 production of certain information?

18 This may be something you want to come back to the
19 Court on. I don't mean to put you on the spot on this now.

20 MR. BUCKLEY: Yes, if I may have one moment.

21 THE COURT: Sure.

22 (Pause.)

23 THE COURT: You know what we're going to do
24 actually, I'm going to do a brief recess. I'm going to let
25 you talk. If you want to talk to the government, that might

1 be helpful as well.

2 Let's say 10 minutes and my deputy will come out and
3 if you need more time, we can do that as well, because I do
4 think as to both of these motions, a lot could be accomplished
5 if the two parties talk to each other. I don't know that you
6 can eliminate all the issues in dispute on these two issues
7 now, but I think you can narrow or potentially eliminate some
8 of the issues in dispute here.

9 So let's take a 10 minute recess.

10 MR. BUCKLEY: Okay, Judge.

11 (Recess taken.)

12 THE COURT: Mr. Buckley, you're standing. Go ahead.

13 MR. BUCKLEY: Thank you, Your Honor.

14 So after conferring with the government, we are
15 going to propose that the parties will present to the court an
16 agreed upon 502(d) stipulation that is addressed to the 502(d)
17 issue alone.

18 I expect that part of that stipulation will include
19 a provision though that before any production is made of the
20 privileged or potentially privileged materials, that the
21 parties have an opportunity to see the protective order and
22 litigate the privilege issue because we do think that there is
23 a serious divide in our view of what is and is not privileged
24 as compared to the government, but understand the Court's
25 position that that's not an issue with respect to merely

1 seeking a 502(d) order.

2 THE COURT: Go ahead, Mr. Gottlieb.

3 MR. GOTTLIEB: Your Honor, with regard to this, I
4 agree with that by and large. I just want to make it very
5 clear that attempts are going to be made again to enter into a
6 stipulation. As far as the process, should any of the parties
7 seek a protective order, I would like to reserve the
8 opportunity to say that that would not be our position.

9 So I can only say obviously we're going to attempt
10 to enter into an agreed stipulation involving everybody but
11 that issue about delaying the production is something that I
12 would like to continue to consider what the position would be.

13 THE COURT: Mr. Colton, any comment?

14 MR. COLTON: No, Your Honor.

15 THE COURT: Thank you.

16 Ms. Elbert?

17 MS. ELBERT: I would just, you know, note for the
18 record that this protracted litigation over privileged,
19 potentially privileged documents that none of the individual
20 defendants will be able to review because they won't be
21 willing to give each other access to them is, in my view, just
22 kicking a can down the road and going to result in a lot of
23 extensive back and forth. We're going to end up in the same
24 place we're in now and, ultimately, the Court is going to be
25 put in the position to determine which interest trumps. My

1 effort in seeking this motion was to avoid months of doing
2 this but that doesn't seem to be --

3 THE COURT: Well, I don't think you put what you
4 were looking for properly before me. I think that's the
5 problem. So I will look out for whatever you now all jointly
6 submit understanding that that may not resolve every issue.
7 There may be different issues, of course, and I can only react
8 to what is presented to me properly for consideration.

9 MS. ELBERT: Okay.

10 THE COURT: But I hear you, Ms. Elbert, and
11 Mr. Gottlieb as well, your concern.

12 MR. GOTTLIEB: Thank you.

13 THE COURT: Let's talk about next conference date
14 and then I'll have some more comments on these motions.

15 I understand that February 11th at 11 o'clock works.
16 Is that correct?

17 MR. BUCKLEY: Yes, Your Honor.

18 MR. COLTON: Yes, Your Honor.

19 THE COURT: Okay. It seems to work for everybody.
20 We'll set the next conference for February 11th at 11 o'clock.
21 Again, it will be in person.

22 I do note that it sounds like there was some useful
23 discussion that occurred among the parties when we took a
24 break. That's the benefit of being in person but, certainly,
25 you don't need to be in front of me to have conversations with

1 each other. I would encourage you to have more of those
2 conversations. I think, you know, the video format has its
3 limitations and maybe because you weren't seeing each other
4 face to face and interacting in this way, maybe there weren't
5 as many conversations, but I think you can accomplish a lot if
6 you talk to each other. We'll set the conference for February
7 11, 2022 at 10 a.m.

8 Is there an application to exclude time between now
9 and then? I heard that there were still issues with discovery
10 really getting to the hands of the defendants, there was some
11 discussion about the discovery or a lot of discovery sitting
12 at DupeCoop, so I would ask whether the parties want an
13 exclusion of time.

14 MS. ELBERT: Yes, Your Honor. The government would
15 submit that an exclusion would be appropriate both in view of
16 the discovery, outstanding discovery issues that Your Honor
17 noted. In addition, the government understands from
18 discussions with the defense that they are planning out their
19 next round of motions and their motion schedule. So the
20 government submits that exclusion is warranted to continue to
21 allow the defense to receive and review discovery and to
22 consider which motions they intend to file in the time frame
23 in which to file them.

24 THE COURT: And does the defendants join in that
25 application to exclude time between now and February 11, 2022?

1 MR. GOTTLIEB: Yes, Your Honor.

2 MR. BUCKLEY: No objection on behalf of Mr. Gentile.

3 MR. COLTON: No objection on behalf of
4 Mr. Schneider.

5 MR. GOTTLIEB: And on behalf of Mr. Lash, no
6 objection.

7 THE COURT: Okay. So I will exclude for Speedy
8 Trial Act purposes the time between today and February 11,
9 2022. I find that the ends of justice served by excluding
10 that time outweigh the best interest of the public and the
11 defendants in a speedy trial because that time period will
12 allow for the continued receipt and review of discovery and
13 will also allow for the defendants to consider what motions
14 and whether they want to make any subsequent motions. So I
15 will exclude that period of time under 18 U.S.C.
16 3161(h)(7)(A).

17 Let me turn back now though to the -- I'll put the
18 502(d) motion to the side because the parties indicated
19 there's going to be a stipulation. Any stipulation I'd like
20 to have a month before the next conference, that would be
21 January 11, 2022. I would also -- you can give it to me
22 before but by that date.

23 I would also like a joint status report from the
24 parties on the Rule 12 motion issues. I think there was, I
25 think Mr. Colton and possibly Mr. Buckley mentioned that there

1 was some willingness to engage in discussions with the
2 government maybe narrowing some of these issues. As I
3 mentioned before, it appeared that the parties were doing some
4 negotiating in their briefing and if they could do the
5 negotiating with each other, maybe it will eliminate some of
6 the issues.

7 Of course, I will address issues that remain
8 properly before me, but if you can narrow the issues, I think
9 that would be something to really think about doing for
10 efficiency purposes and because, as has been referenced
11 several times, you know, by, I think, both sides or all sides,
12 there are going to be other motions to be made and this is a
13 significant case and you will be dealing with each other for a
14 long time. So if you can narrow issues to the issues that I
15 really do need to decide, I think that would be in everybody's
16 interest but, again, I'll decide what's properly before me.

17 I am not going to take under advisement at this time
18 the motions because I don't feel that they're fully fleshed
19 out yet and I'm awaiting this, you know, additional
20 information from you.

21 So by January 11th, I'd like the stipulation and I'd
22 like a joint status report to tell me about the status of the
23 Rule 12 motion. Specifically, I want the defendants, to the
24 extent that they have not resolved completely the issues
25 implicated by the Rule 12 motion, I want the defendants to

1 indicate specifically what leave, if any, they're still
2 seeking under Rule 12.

3 I guess if the stipulation does not happen in that
4 same joint letter to be filed no later than January 11th, the
5 government can indicate if it intends to proceed on a
6 Rule 502(d) motion.

7 MS. ELBERT: Of course, Your Honor.

8 MR. MENCHEL: Your Honor, this is Matthew Menchel.
9 Nice to meet you, by the way may. Can we have a moment to
10 confer before you close the record?

11 THE COURT: Yes, you may.

12 (Pause.)

13 THE COURT: Okay. I'm going to leave the bench for
14 five minutes. I'm going to allow you to keep talking.

15

16 (Recess taken.)

17 THE COURT: Okay. You can all be seated.

18 We're going to adjourn.

19 Is there anything else briefly anyone needs to take
20 up? I think we kept you here a long time. I think it's been
21 productive.

22 MR. MENCHEL: I apologize. The reason I wanted that
23 little mini conference is I just want it to be clear where
24 we're not back in a month and had no progress.

25 THE COURT: I don't want that either. Thank you.

1 MR. MENCHEL: I know you don't.

2 Anyway, the government has agreed that the
3 stipulation or no as to the 502(d), before they make any
4 production, they'll give us an opportunity to make some type
5 of appropriate motion if we object. That's all I wanted on
6 the record. I think we'll probably have that stipulation so I
7 just wanted to make that clear.

8 THE COURT: Thank you. And I'll review anything
9 that is submitted to me.

10 Anything, Ms. Elbert?

11 MS. ELBERT: No, Your Honor.

12 THE COURT: Okay. We're going to adjourn then until
13 February 11th at 11 o'clock.

14 MR. GOTTLIEB: Thank you.

15 THE COURT: Thank you all and stay safe.

16 (Matter concluded.)

17

18

19 * * * * *

20

21 I certify that the foregoing is a correct transcript from the
22 record of proceedings in the above-entitled matter.

23 /s/ Charleane M. Heading

November 24, 2021

24 _____
CHARLEANE M. HEADING

DATE

25