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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 21-CR-00054(DG)

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:
-against- : United States Courthouse
: Brooklyn, New York

:
: December 9, 2022
: 10:30 a.m.

DAVID GENTILE, JEFFRY :
SCHNEIDER, JEFFREY LASH, :

Defendants. :

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TRANSCRIPT OF CRIMINAL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE DIANE GUJARATI
UNITED STATES DISTRICT JUDGE

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19 Proceedings recorded by computerized stenography. Transcript
20 produced by Computer-aided Transcription.

21 * * * * *

22 (In open court.)

23 THE COURTROOM DEPUTY: All rise.

24 Criminal cause for oral argument in docket number
25 21-CR-054, United States of America versus David Gentile, et
al.

Counsel, please state your appearances for the
record, starting with the Government.

MS. ELBERT: Good morning, Your Honor.

Lauren Elbert, Artie McConnell, and Garen Marshall

1 for the United States.

2 THE COURT: Good morning to you all.

3 MR. MENCHEL: Good morning, Your Honor.

4 Matthew Menchel, Adriana Riviere, and Sean Buckley
5 on behalf of David Gentile, who is present in court.

6 THE COURT: Good morning to you all.

7 MR. COLTON: Good morning, Your Honor.

8 Glenn Colton, Apeksha Vora, and Laura Zell for
9 Jeffry Schneider, and Mr. Schneider is present here in the
10 courtroom at table.

11 THE COURT: Good morning to all of you.

12 MR. GOTTLIEB: Good morning, Your Honor.

13 Robert C. Gottlieb & Associates. I'm Robert
14 Gottlieb, and with me is Paul Townsend, together with our
15 client, Jeffrey Lash.

16 THE COURT: Okay. And good morning to all of you.
17 Everyone may be seated.

18 So we're convened today for oral argument on
19 defendants' Gentile and Schneider's pretrial motions. There
20 are no pending motions filed by Mr. Lash.

21 I've reviewed the parties' submissions carefully,
22 and I am very familiar with the parties' arguments. In order
23 for today to proceed efficiently, and because we are going to
24 be covering a lot of material, I'm going to begin by asking
25 some specific questions with regard to each of the motions.

1 And, given that these are issues that I need clarification on,
2 I would just ask that you be as responsive to my questions as
3 you possibly can. That will make things the most efficient
4 today.

5 At times, I may frame, you know -- in framing my
6 questions, I may summarize your arguments. My summaries are
7 not designed to be comprehensive, but if you think I have
8 mis-summarized your arguments, certainly speak up. But,
9 again, I just want to make sure we are focussing on the issues
10 that the Court is most interested in hearing about because,
11 again, I have read all of your papers very, very carefully.
12 And I, likely, will give you a chance to speak on issues that
13 you want to raise -- maybe that I haven't raised -- if that
14 seems necessary after you answer my specific questions.

15 So there are six pretrial motions pending before the
16 Court. Defendants Gentile and Schneider submitted two motions
17 jointly. Those are the joint motion to dismiss the indictment
18 and the joint motion for discovery and subpoenas.

19 And then Defendants Gentile and Schneider each
20 submitted two additional motions.

21 Let me ask counsel for Mr. Gentile, you have joined
22 in Mr. Schneider's motion to suppress fruits of the Google
23 search warrant; is that correct?

24 Okay. This is not designed to be a trick question.
25 This is pretty basic. Yes or no.

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1 MR. MENCHEL: I don't know -- we have not, no.

2 THE COURT: What about ECF number 162-2 at page 1,
3 note 1?

4 MR. MENCHEL: Just one second, Your Honor.

5 I apologize. I stand corrected. We have.

6 THE COURT: Thank you.

7 And you've also joined in Mr. Schneider's motion to
8 suppress compelled testimony and statements; is that correct?

9 MR. MENCHEL: That's correct, Your Honor.

10 THE COURT: Is there any limit on the extent to
11 which you have joined in either of those motions?

12 MR. MENCHEL: Yes. As to the first motion, the
13 motion to suppress the Google warrant, I think, as noted in
14 the footnote, insofar as it relates to material sent to or
15 from Mr. Gentile -- insofar as it relates to materials sent to
16 or from Mr. Gentile, and over to -- and, therefore,
17 Mr. Gentile makes -- we argue has an expectation of privacy.

18 THE COURT: Thank you.

19 And with respect to the other motion?

20 MS. RIVIERE-BADELL: No, Your Honor. There's no
21 limitation.

22 THE COURT: Thank you.

23 Let me ask counsel for Mr. Schneider. You have
24 joined in Mr. Gentile's motion to suppress materials seized
25 during the February 28th, 2019, searches; is that correct?

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1 MR. COLTON: Yes, Your Honor.

2 THE COURT: And you have also joined in
3 Mr. Gentile's motion to suppress testimony; is that correct?

4 MR. COLTON: Joint in the relief requested. We are
5 asserting different bases for the respective suppression of
6 testimony motions.

7 THE COURT: Okay. And is that the only limitation
8 on the degree to which you have joined in either of the two
9 Gentile separate motions?

10 MR. COLTON: Yes, Your Honor.

11 THE COURT: Thank you.

12 So let me turn, first, to Mr. Gentile's motion to
13 suppress testimony.

14 How does Mr. Gentile respond to the Government's
15 argument that Mr. Gentile was informed of his Fifth Amendment
16 right before providing the testimony at issue and that he was
17 represented by experienced, capable counsel during the
18 depositions?

19 MS. RIVIERE-BADELL: Thank you, Your Honor.

20 First, we would say that it's true, Mr. Gentile was,
21 in fact, aware that there were -- that there was a pending
22 criminal investigation. But, Your Honor, that is different
23 than actual knowledge that he was a target -- a criminal
24 target for the indictment for which he ultimately was charged.
25 And that is important, Your Honor, because under the case that

1 we cited *Scrushy*, specifically, the Court says, it's
2 essentially different, right. You need to know that you're a
3 target, and the case -- the case actually uses that specific
4 language.

5 I'm sorry.

6 But, more importantly --

7 THE COURT: You can move if there's a more
8 convenient place for you to have your papers. And if you're
9 closer to the microphone, that would be helpful. Take your
10 time to settle in. That's fine.

11 MS. RIVIERE-BADELL: Thank you, Your Honor.

12 Your Honor, specifically in *Scrushy*, the Court says,
13 quote -- and this is at page 1139 -- when a defendant --
14 italicized -- knows that he has been charged with a crime, or
15 that a criminal investigation has targeted him, he can take
16 actions to prevent the providing of information in a civil
17 proceeding that can later be used against him in a criminal
18 case.

19 When a defendant does not know, the danger of
20 prejudice increases. And in *Scrushy*, the judge says, again,
21 they failed -- the Government failed to advise Mr. Scrushy, or
22 his attorneys, about the criminal investigation of which he
23 was a target. He was equally represented by experienced white
24 collar counsel, he was equally aware that there was other
25 investigations that were pending, but the Government didn't

1 inform him or his attorneys.

2 But, Your Honor, more importantly than that, that is
3 not relevant to the standard of whether the Government is not
4 allowed to use a civil discovery process for purposes of a
5 criminal investigation.

6 So regardless of whether Mr. Gentile knew, had
7 reason to suspect, or speculated -- which clearly there is
8 evidence of that -- regardless of that, the Government still
9 cannot improperly use a civil discovery procedure for purposes
10 of a criminal case. And that's, at bottom, what we're arguing
11 is the improper coordination, which is the basis for the
12 motion to suppress.

13 THE COURT: Thank you.

14 So I note that in Defendant Mr. Schneider's motion
15 to suppress the fruits of the Google search warrant -- which
16 Mr. Gentile has joined, at least in certain respects --
17 Mr. Schneider argues that the Government falsely claimed that
18 its ongoing criminal investigation was not public or known to
19 all of the targets of the investigation in order to obtain a
20 nondisclosure order, and, I guess, somewhat intention is
21 Mr. Gentile's motion to suppress testimony where he's
22 asserting that he was not informed that he was a target of the
23 investigation, but I think you are making a distinction
24 between being aware of an investigation and being informed of
25 being a target; is that right?

1 MS. RIVIERE-BADELL: Yes. Yes, Your Honor.

2 THE COURT: Okay.

3 Does counsel wish to comment any further -- counsel
4 for Mr. Gentile -- about Mr. Gentile's position as to what he
5 knew about the Government's investigation at the time of the
6 testimony?

7 MS. RIVIERE-BADELL: Yes, Your Honor. Only to say
8 that what's important here, and what we've really focused on,
9 is the Government has not provided any evidence at all as to
10 what exactly it shared with the SEC, what the communications
11 were, and that's really important, Your Honor. The
12 supplemental authority that we provided in all of the cases,
13 really, decide the question in the context of actual evidence:
14 sworn testimony, actual documents, communications between the
15 two agencies --

16 THE COURT: So let's talk about *Burton*.
17 Who has to make the initial showing?

18 MS. RIVIERE-BADELL: The defendant, Your Honor. And
19 we have. We've made a showing. And this is -- the facts that
20 we've demonstrated in our motion are very similar to the facts
21 in the supplemental authority that we submitted, very similar
22 to --

23 THE COURT: Are you talking about the Judge Cronan
24 decision?

25 MS. RIVIERE-BADELL: Judge Cronan. And also very --

1 very similar in *Alexandre* -- Judge Cronan's decision in
2 *Alexandre*. Also very similar to Judge Furman's decision in
3 *Rhodes*, which was cited to in *Alexandre* opinion. So it's the
4 same -- the same facts. So just as we have in our case -- in
5 *Alexandre* -- the defendant alleged, and the Government did not
6 dispute, that there were simultaneous filing of a civil
7 complaint, an indictment, overlapping evidence and language in
8 the charging instruments, acknowledgment of cooperation, an
9 expression of thanks between civil and criminal agencies in
10 press releases, an access grant between the civil and criminal
11 agency, and use of information obtained in the civil
12 investigation by the prosecution. All of those factors exist
13 in our case. They existed in *Alexandre* --

14 THE COURT: What's your definition of a parallel
15 investigation?

16 MS. RIVIERE-BADELL: Well, parallel investigation is
17 that the two agencies are investigating on completely separate
18 tracks: Without the involvement of the FBI, for example, or
19 the prosecution in the SEC case; without the involvement of
20 the SEC in the DOJ case. We've alleged the facts that we're
21 aware of. We've asked multiple times for information. The
22 Government has refused to provide any communications, so we
23 can only proceed with what we have.

24 Judge Furman actually noted in *Rhodes* that that's
25 the disadvantage, right? This information is exclusively

1 within the possession of the Government. We don't have access
2 to it. And that's why Judge Furman requested -- required --
3 ordered that the Government not produce just one affidavit,
4 but made them do it a second time, because he wanted to know,
5 with specificity, what exactly was the circumstances of the
6 communication and coordination between the two agencies.

7 And in *Alexandre*, which Judge Cronan said -- which
8 we think is apt here, he said: Given the contentions cited by
9 the defendant, similar to the contentions we've made, and the
10 absence of a sworn statement from the Government -- that's
11 absent here as well -- the Court concludes that the prudent
12 course is to further develop the record through affidavits
13 from the parties. And we believe, Your Honor, at a minimum,
14 that's what should happen here, because we have absolutely no
15 sworn testimony, no documents from the Government to respond
16 to our position. What we have is, basically, trust us, we can
17 do that. And it's not even specific as to what exactly they
18 did or didn't do.

19 In all of the cases that the Government cites, that
20 we cite, there was plenty of evidence that was put into the
21 record: Sworn testimony from the respective agencies; in one
22 case, you know, internal memos were reviewed; communications
23 between the agencies were reviewed. We have none of that
24 here.

25 THE COURT: Can you just walk me through, as

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1 specifically as you can, what you are relying on to
2 demonstrate that you've met your burden?

3 MS. RIVIERE-BADELL: In term of what we've
4 alleged -- the facts that we've alleged? Or --

5 THE COURT: Whatever you're relying on to claim that
6 you've met your burden.

7 MS. RIVIERE-BADELL: Yes, Your Honor.

8 So we've alleged that the DOJ -- well, we've
9 demonstrated that the DOJ and the SEC investigations started
10 at virtually the same time in March of 2018. There was an SEC
11 letter to GPB initiating an audit in May 31st of 2018. The
12 DOJ issued a grand jury subpoena. The DOJ used information
13 that it obtained from the SEC to support the FBI's assertion
14 of probable cause to search and seize materials from GPB. So
15 from the February 27, 2019, affidavit, we have statements from
16 the special agent that says he's familiar with the facts from,
17 among other things, reports made to him by members of the SEC.

18 He also alleges in the affidavit that he's aware
19 that on or about September of 2018 the SEC served GPB with a
20 preservation notice requiring GPB to maintain all records. We
21 know that the SEC is filed its complaint against Mr. Gentile
22 on the same day that the DOJ unsealed its indictment. The
23 indictment and the SEC complaint contained substantially
24 overlapping allegations targeting the same conduct. The
25 Government itself recognized this when it moved for a stay.

1 It said the same underlying thoughts are at issue in both
2 matters. The same alleged fraudulent schemes are at issue in
3 both the civil and criminal cases. The Government even says:
4 Indeed there is substantial overlap in the core factual
5 allegations underlying the SEC action, and the factual
6 questions, that will likely be resolved in the criminal case.

7 Over 90 percent of the documents of the DOJ produced
8 in criminal discovery came from the SEC. We're talking about
9 6 million documents came from the SEC. And after indicting
10 Mr. Gentile, the DOJ admitted to working extensively with the
11 SEC, thanking the SEC for its, quote, significant cooperation
12 and assistance during the investigation. The SEC similarly
13 expressed appreciation for the assistance of the US Attorney's
14 Office for the Eastern District of New York and the FBI.

15 And, finally, the DOJ moved to stay the SEC case
16 against Mr. Gentile, so effectively blocking him from
17 obtaining civil discovery to which he would otherwise have
18 been entitled. And, Your Honor, in response to that, again,
19 the Government cites no evidence.

20 So those are all undisputed facts, and the
21 Government has not provided any evidence to actually detail
22 what its involvement was, what its communications -- what its
23 coordination was with the SEC.

24 THE COURT: Thank you.

25 MS. RIVIERE-BADELL: Thank you, Your Honor.

1 THE COURT: Let me turn to counsel for Mr. Schneider
2 and your motion to compel testimony and statements. I'm going
3 to ask you a similar question that I asked Mr. Gentile's
4 counsel, which is: How do you respond to the Government's
5 argument that your client was informed of his Fifth Amendment
6 rights before providing the testimony at issue, and that he
7 was represented by experienced, capable counsel during the
8 depositions?

9 MS. VORA: Sure, Your Honor.

10 Thank you.

11 So with respect to Mr. Schneider's motion, I would
12 like to just clarify also that the improper coordination that
13 we allege here is really just to show that the violation of
14 the Fifth Amendment, as interpreted by *Garrity* and its
15 progeny, is worse, and so it's really part of our *Garrity*
16 argument.

17 However, to answer your question directly, I think
18 no one really disputes that Mr. Schneider was aware of his
19 Fifth Amendment right and knew that he could invoke it. The
20 point here for Mr. Schneider is that he was threatened with
21 substantial economic sanctions and said -- to the point that
22 he was faced with a Hobson's choice between his livelihood or
23 to pay the penalty of self-incrimination, and, as a result, he
24 wasn't able to invoke his Fifth Amendment right fairly, as the
25 Supreme Court has interpreted in *Garrity* and its progeny.

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1 THE COURT: Thank you.

2 Let me ask now -- is there something else you wanted
3 to raise?

4 MS. VORA: No, Your Honor.

5 THE COURT: Since I've asked about the motions
6 relating to the deposition testimony of both defendants, let
7 me ask the Government if you would like to comment on those
8 motions? And, specifically, if there's any response you want
9 to make to any of the comments that have been made or any of
10 the questions I've asked.

11 MS. ELBERT: Yes, Your Honor.

12 The case that the defense recently brought to Your
13 Honor's attention -- the *Alexandre* case and the *Rhodes* case --
14 both provide that in order for the defense to obtain even
15 limited discovery or an evidentiary hearing as to the extent
16 of coordination between the DOJ and the SEC, there has to be,
17 quote, a substantial preliminary showing of bad faith, and the
18 defense has failed to make any such showing here, nor could
19 they. This case is distinguishable from the *Alexandre* case.
20 There, there was a claim that the department improperly
21 coordinated with the CFTC and the court-appointed receiver.
22 There, the CFTC and receiver were present at the search
23 warrant execution in that case. That didn't happen here. The
24 FBI and the receiver conducted a divide-and-conquer approach
25 to reviewing search warrant materials. That didn't happen

1 here. The receiver confiscated the defendant's laptop --

2 THE COURT: Can I just ask you to slow down for the
3 benefit of the court reporter, please.

4 MS. ELBERT: Sure.

5 THE COURT: Thank you.

6 MS. ELBERT: The receiver confiscated the
7 defendant's laptop for review by both of the agencies. That
8 didn't happen here. The CFTC joined at the criminal court
9 appearances. That hasn't happened here. And the receiver
10 refused to comply with discovery requests absent approval from
11 the Government and the CFTC. None of those factors are
12 present in this case.

13 This case represents a run-of-the-mill, parallel
14 investigation where the DOJ and the SEC have engaged in joint
15 fact-gathering, as is common in this type of case, and has
16 been -- has expressly found to not be problematic in a number
17 of cases, which we cited in our papers.

18 And so given the utter lack of any suggestion that
19 there was anything improper, or that the DOJ used the SEC as a
20 pawn, which is the allegation in order to generate evidence
21 for the criminal case, the Government submits that the motion
22 to suppress should be denied on that basis, but that, further,
23 there is no need for any further fact development, evidentiary
24 hearing, or discovery.

25 THE COURT: Could you respond to -- is it Ms. Vora?

1 Is that how you pronounce you name?

2 MS. VORA: Yes, Your Honor.

3 THE COURT: Could you respond to Ms. Vora's argument
4 about the -- essentially, the Hobson's choice that she claims
5 her client faced?

6 MS. ELBERT: Yes, Your Honor.

7 So the *Garrity* case stands for the proposition that
8 where an individual's invocation of the Fifth Amendment, in
9 that case, triggers automatic dismissal, automatic loss of
10 pension benefits, that forces potential deponent into the
11 Hobson's choice that the defense eludes to where they're
12 forced to choose between their livelihood and potentially
13 incriminating results.

14 Subsequent cases that we've cited such as *Gilbert*,
15 which was the SEC case, and *Solomon*, which is the case
16 involving the New York Stock Exchange, have shown that where
17 there's a prospect, a potential negative consequence for a
18 registered party's license that could be imposed in the event
19 the defendant chose to testify, depending on the facts of a
20 specific case, that that does not trigger the *Garrity*
21 prohibition; that the consequence has to be essentially
22 definite and automatic. And, here, there's no suggestion that
23 that was the case. As we note in our papers, the New Jersey
24 statute referring to consequences for failure to cooperate on
25 the part of registered parties is almost identical to the rule

1 in *Solomon* that they found did not suggest an automatic
2 consequence.

3 And in *Gilbert*, which was the SEC case, it was
4 likewise what was at issue was an SEC registration.

5 And so here, the potential consequence was not
6 sufficiently automatic or concrete to trigger the *Garrity*
7 rule.

8 THE COURT: Thank you.

9 Is there anything else you want to raise on those
10 two motions?

11 MS. ELBERT: No, Your Honor.

12 MS. VORA: Your Honor, may I respond?

13 THE COURT: Yes. Very briefly.

14 MS. VORA: Thank you.

15 I would just like to point out that *Garrity* and its
16 progeny do not require an automatic or certain penalty. In
17 fact, subsequent cases like *Spevack v. Klein* -- which actually
18 was decided the same day as *Garrity* -- *Lefkowitz v. Turley* and
19 *U.S. v. Connolly* all had situations where the penalty was not
20 automatic or certain. Yet in each of those cases, the
21 individual there faced economic sanctions, and the courts in
22 those cases, including the Supreme Court, found that the
23 threat of such sanctions was sufficient to render their
24 testimony compelled within the meaning of *Garrity*.

25 Now, the Government, in its opposition at least, has

1 failed to rebut any of those cases and instead asks the Court
2 to improperly limit the scope of *Garrity*.

3 Now with respect to *Gilbert*, which Ms. Elbert
4 specifically talked about, the broker in that case was asking
5 the Court to make a series of logical leaps before getting to
6 the point where the indication of his Fifth Amendment rights
7 would result in sanctions, and that's not the case here. As
8 Your Honor is familiar with our papers, the NJBOS and the SEC
9 specifically invoked their ability to sanction Mr. Schneider
10 if he did not sit for testimony. And so, in our case, there
11 aren't those various logical leaps that was present before the
12 Court in *SEC v. Gilbert*.

13 THE COURT: Thank you.

14 MS. RIVIERE-BADELL: Your Honor, if I can just
15 briefly respond as well?

16 THE COURT: Yes.

17 MS. RIVIERE-BADELL: So with respect to the
18 *Alexandre* case, Your Honor, the Government there made exactly
19 the same arguments that you've heard from the Government
20 today. It said in the -- in the decision, it says: The
21 Government characterizes the work as wholly unremarkable and
22 routine, says the Government, avers that the CFTC and receiver
23 investigations were conducted --

24 THE COURT: Slow down, please. Slow down.

25 MS. RIVIERE-BADELL: Sorry -- were conducted

1 independently, and that no joint interviews occurred.

2 Actually, in our case, there were joint interviews. The FBI
3 conducted joint interviews direct -- the prosecution with the
4 SEC, and the FBI took notes of those.

5 In -- although the Government points to the receiver
6 taking a laptop in the *Alexandre* case, in our case, the FBI
7 used information from the SEC to execute an affidavit and
8 ultimately obtain a search warrant.

9 And in the *Alexandre* case, what Judge Furman
10 ultimately concluded was that the representations from the
11 Government, however, come from unsworn statements in its brief
12 and at oral argument, exactly what it's doing here. And, as a
13 result, he said --

14 THE COURT: Sorry, which case are you talking about?
15 *Alexandre* or the Furman case?

16 MS. RIVIERE-BADELL: *Alexandre*.

17 THE COURT: The Cronan case you're talking about --
18 Judge Cronan.

19 MS. RIVIERE-BADELL: In the *Alexandre* case.

20 THE COURT: I think you just said Judge Furman. I
21 want to make sure I know which case you are talking about.

22 MS. RIVIERE-BADELL: Cronan -- Judge Cronan's case.

23 THE COURT: In *Alexandre*.

24 MS. RIVIERE-BADELL: In *Alexandre*. Yes, Your Honor.

25 Although very similar facts in Judge Furman's case as well for

1 *Rhodes.*

2 So Judge Cronan, in the *Alexandre* case, ordered that
3 the Government shall submit affidavits describing with
4 specificity the nature and extent of the prosecutor's and the
5 FBI's relationship with the CFTC and the receiver during their
6 investigations with the defendant. And he went on to list
7 specific communications that he wanted to see. And that's
8 exactly what we're asking for, Your Honor. We've asked for it
9 before. The Government has refused to give it to us.

10 And so we believe, Your Honor, that -- and the
11 Government has not responded to why they haven't submitted
12 sworn affidavits --

13 THE COURT: I think the Government essentially did.
14 I think -- and Ms. Elbert can correct me if I'm wrong, but I
15 think her position is that no more is required on this record.

16 MS. RIVIERE-BADELL: No more is required, that's
17 right, but --

18 THE COURT: Let me just stop you.

19 Is that correct?

20 MS. ELBERT: That's correct, Your Honor.

21 THE COURT: Okay. Go ahead.

22 MS. RIVIERE-BADELL: Citing to the *Alexandre* case,
23 where exactly in that case, the judge said more was required
24 on basically the same facts that we have, and even more,
25 because we have joint interviews here, and that was not

1 present in the *Alexandre* case.

2 THE COURT: Thank you.

3 Let's turn now to Mr. Gentile's motion to suppress
4 materials seized during the February 28th, 2019, searches.

5 And I'm going to ask -- I will let you get settled
6 in.

7 MR. MENCHEL: Thank you. I appreciate it.

8 THE COURT: Sure.

9 I'm going to ask both Mr. Gentile's counsel and
10 counsel for the Government to respond to the opponent's
11 arguments as to whether Mr. Gentile has standing to move to
12 suppress the fruits of the GPB warrants. And everybody knows
13 I'm talking about the three warrants at issue here, right?

14 So let me -- you start. I think counsel for
15 Mr. Gentile, I think it makes sense to start with you.

16 MR. MENCHEL: Matthew Menchel, Your Honor.

17 THE COURT: Yes, I know your name.

18 MR. MENCHEL: I haven't actually spoken before in
19 this courtroom.

20 THE COURT: Okay. Go ahead.

21 MR. MENCHEL: Your Honor, the general standard as to
22 whether or not Mr. Gentile has standing involves two distinct
23 questions: The first one is whether an individual has a
24 subjective expectation of privacy. And Mr. Gentile had filed
25 an affidavit in this case, which we think lays out those

1 facts, and that prong is satisfied.

2 The second is whether the expectation of privacy --

3 THE COURT: Okay. I'm so sorry to ask you to slow
4 down. I know it's hard to speak in a pace that's not your
5 normal pace, but for the benefit of the record here, which I
6 think everybody needs to have a clear record here, please slow
7 down.

8 MR. MENCHEL: Absolutely.

9 The second prong, Your Honor, is whether the
10 expectation of privacy is one that society accepts as
11 reasonable. And in the context of a standing of an individual
12 over a corporate entity, the question is whether the corporate
13 officer -- in this case, Mr. Gentile -- was both the CEO and
14 the sole owner of GPB. As a reasonable expectation of privacy
15 to challenge a search of business premises focuses principally
16 on whether he has made a sufficient showing of a possessory of
17 propriety interest in the areas searched. I'm citing for that
18 proposition *United States vs. Zemlyansky*, which I'm sure the
19 Court's familiar with.

20 THE COURT: Yes.

21 MR. MENCHEL: And courts have held that the
22 ownership of a business is sufficient to establish standing to
23 challenge the search of a business, precisely because it is
24 reasonable for society to accept that somebody who solely owns
25 a company has an expectation of privacy in the company that

1 they own. It's a pretty common sense notion. There were a
2 number of cases that I think we cited in our papers -- I
3 already mentioned it -- *Zemlyansky*. But *United States vs.*
4 *Wey*, Judge Nathan noted that the Government didn't even object
5 on exactly the same facts. The individual in *Wey* --
6 Mr. Wey -- was the 100 percent owner and proprietor of the
7 company for which the search had taken place.

8 There's another case that we just found last night
9 that's not in our papers, Your Honor -- it's an older case --
10 *United States vs. Schwimmer* at 692 F. Supp. Same thing. It
11 rejected the Government's argument that the defendant's
12 privacy interest was limited only to his personal office and
13 found that, quote, his ownership and control of First United,
14 his participation in the company's affairs, and his office at
15 the company's suite of offices is sufficient for the Court to
16 find that they had a legitimate expectation of a privacy in
17 the entire suite of First United's offices, and thus had
18 standing to challenge the search.

19 I can go on, but I -- I have established the base of
20 the framework, and I think we have met our burden here.

21 THE COURT: Let me turn to the Government.

22 MR. McCONNELL: Thank you, Your Honor.

23 There's two factual points, and, again, we've
24 briefed this issue fairly extensively when we were discussing
25 the privilege issue --

1 THE COURT: Right.

2 MR. McCONNELL: -- so I don't want to, sort of,
3 repeat myself, but the two main points are, number one, being
4 the owner of the company does not exempt Mr. Gentile for the
5 policies that are in place at the company. They're explicitly
6 outlined in the GPB employee handbook --

7 THE COURT: Let me stop you there, though, because,
8 as I understand the argument is he's arguing he's not an
9 employee.

10 MR. McCONNELL: There's no carveout --

11 THE COURT: Am I right on that defense argument?

12 MR. MENCHEL: That is exactly correct, Your Honor.

13 THE COURT: Go ahead.

14 MR. McCONNELL: I suppose we can just agree to
15 disagree on that characterization. There's no carveout for
16 him in the employee handbook, so --

17 THE COURT: I think agreeing to disagree maybe
18 understates the situation here. I understood the Government
19 is relying on an employee manual.

20 MR. McCONNELL: Correct. Well, we are not
21 exclusively relying --

22 THE COURT: I understand that, but at least in part,
23 right?

24 MR. McCONNELL: Yes.

25 THE COURT: Okay. Go ahead.

1 MR. McCONNELL: Moreover, the GPB -- and perhaps
2 more importantly and separately, GPB, they're an SEC
3 registered investment advisor. They're subject to the various
4 rules regarding record retention and inspection by the SEC.
5 They're very clear -- Mr. Gentile certainly was aware of
6 them -- that all records maintained by an investment advisor
7 like GPB are subject to, quote, at any time a reasonable,
8 periodic, special, or other examinations by representative of
9 the Commission as the Commission deems necessary or
10 appropriate in the public interest, or for the protection of
11 investors. And the case law is very clear that -- that that
12 destroys any expectation of privacy with respect to emails on
13 another communication sent over the company's system.

14 MR. MENCHEL: May I respond?

15 THE COURT: Yes.

16 MR. MENCHEL: Your Honor, as you rightly pointed
17 out, he is not an employee of the company.

18 THE COURT: No, I didn't point out that. I pointed
19 out that that was your position.

20 MR. MENCHEL: Okay. Well, that's our position --

21 THE COURT: Yes.

22 MR. MENCHEL: -- and it's in an affidavit that's
23 been filed in this case, as well as the fact that the
24 affidavit says that as -- this is paragraph 7 of the affidavit
25 that we filed -- as the sole owner of GPB -- this is

1 Mr. Gentile's affidavit -- I did not believe that, one, I was
2 subject to any policies issued by GPB regarding employee use
3 of technology and communications; two, anyone at GPB would or
4 could monitor my digital communications; three, anyone at GPB
5 would or could access my computer files located in my private
6 office without my explicit authorization and/or prior
7 knowledge.

8 The case that I think counsel was referring to is
9 the *Asia Global Crossing* case -- which I believe they refer to
10 as the *Global Crossing* case in their papers, but I think is
11 commonly referred to *Asia Global*, just to avoid any confusion
12 on that -- and it's clear that that case stands for the
13 proposition of employees in a company whether they have an
14 expectation of privacy of a work computer in their space.

15 As I said, he is the sole proprietor. And I don't
16 think that's in dispute. That he is the owner of the company
17 is not in dispute, I don't believe. They alleged it,
18 actually, in their search warrant that he was the sole
19 principal of the company, and the *Asia Global* criteria only
20 applies to employees, not to owners, as I've read the case
21 law.

22 In any event, if you want to apply the factors in
23 *Asia Global*, the only one that really fits the facts here is
24 the one that counsel just made reference to that there is a
25 regulated entity -- in this case, the SEC -- that has the

1 right to inspect or look at records -- which, by the way, they
2 didn't actually do in this case. They subpoenaed, rather than
3 just showing up unannounced and demand to inspect.

4 But the other factors that *Global Asia* references do
5 not apply to Mr. Gentile. The other factors are: Does the
6 corporation maintain a policy banning personal other
7 objectionable use of electronics? That's a factor to
8 consider. The answer in this case, under that very employee
9 manual, is no. The employee manual explicitly provides that
10 employees can, quote, use the company's technology resources
11 for incidental personal uses so long as such use does not
12 interfere with the employee's duties, is not done for monetary
13 gain, does not conflict with the company's policies, and does
14 not violate any company policy.

15 That's the employee handbook at page 17.

16 The second factor under *Asia Global* -- am I doing
17 okay? Okay -- does the company monitor the use of the
18 employee's computer or email? The answer to that question is
19 no. No one monitored -- and there's been no evidence
20 proffered by the Government -- Mr. Gentile's computer or
21 email. In fact, his declaration, as I've just read, is to the
22 contrary.

23 Even assuming, arguendo, that the employee manual
24 did apply to Mr. Gentile, the manual only indicates that it
25 could monitor email and computer usage, not that it does or

1 that it did.

2 Four -- because the third factor is the factor about
3 whether or not a third party has right to access the computer
4 or the emails. That's the SEC point counsel has made.

5 Four: Did the corporation notify the employee, or
6 was the employee aware of the use and monitoring policies?

7 Again, Mr. Gentile's declaration definitively
8 establishes that given that he was not a supervisor, he did
9 not believe that the policies applied to him.

10 So we think the other three factors under *Global*
11 *Asia* weigh in favor of Mr. Gentile, and he has standing to
12 contest the search of their office.

13 THE COURT: Thank you.

14 Let me turn back to the Government. It looks like
15 you had some response, but I would be interested to hear more
16 about your argument that the SEC could have come in, or
17 regulators could have come in.

18 MR. McCONNELL: Well, I would point to the *Nordlicht*
19 case. In that case, there was no evidence that employee
20 communications were actually being monitored, and the Court
21 still found that, like other employees of the SEC registered
22 investment advisor, the founder and the principal of the hedge
23 fund also had no expectation of privacy where, like here, the
24 manual explicitly told employees that they had none.

25 So that --

1 THE COURT: But, more specifically, my question --
2 and I hear your point on that, but was on the argument you
3 made about the fact that regulators could have come in to
4 inspect.

5 MR. McCONNELL: What specifically, Judge?

6 THE COURT: Do you have more case law or anything
7 along those lines?

8 MR. McCONNELL: No, nothing else to add, Judge.

9 THE COURT: Okay.
10 Counsel for Mr. Schneider is on his feet.

11 Yes, what is it?

12 MR. COLTON: Thank you.

13 If the Court -- I have comments if the Court is
14 moving off of the standing issue to just make sure we close
15 the loop on the GPB search standing issue. If the Court had
16 other questions, then I will sit back down and save my
17 comments.

18 THE COURT: I have quite a few other questions about
19 the warrants. Is there something you wanted to say
20 specifically on standing?

21 MR. COLTON: Yes, Your Honor.

22 THE COURT: Because my question was Mr. Gentile's
23 standing.

24 MR. COLTON: I understand, Your Honor.

25 THE COURT: Okay. Go ahead.

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1 MR. COLTON: I just want to make sure that it
2 doesn't get glossed over that we have asserted standing --

3 THE COURT: Yes, I understand that.

4 MR. COLTON: -- we submitted a letter that the
5 Government didn't object to, so if we have any questions, we
6 are happy to answer them. If there's no dispute that the
7 standing be asserted in the letter filed -- I think it's ECF
8 161 -- then, obviously, no dispute requires no argument.

9 THE COURT: Right, it is 161. And I was going to
10 ask the Government about that, because you have asserted that
11 the Government has conceded something, and I certainly would
12 like the Government's position on that, but we will take that
13 up shortly. Thank you.

14 Counsel for Mr. Gentile, you argue that the
15 affidavits underlying the GPB warrants contain material
16 misrepresentations and omissions. I would like you to
17 identify the precise representations in the search warrants
18 that you contend are material misrepresentations as distinct
19 from omissions. I'm really focused now on the
20 misrepresentations.

21 MR. MENCHEL: Yes. Would it be helpful if I handed
22 up a copy of the affidavit so I can show you the actual
23 paragraphs, paragraph by paragraph.

24 THE COURT: This is something you filed, correct?

25 MR. MENCHEL: This is the search warrant affidavit.

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1 THE COURT: Just give me the ECF number, please.

2 MR. MENCHEL: It was attached to the papers as
3 Exhibit -- I believe it was Exhibit A. But I just wanted, for
4 the sake of ease, to just give you a copy of it.

5 THE COURT: Do you have a stamped copy where you can
6 give me the ECF number? It may make it easier to grab.

7 MR. MENCHEL: It was filed under seal. We don't
8 have stamped copies; they were filed under seal.

9 THE COURT: Give me a moment.

10 You know what, if you have an extra copy, I will
11 take it. I'm sure I have it here, but if that's easier. Just
12 make sure the Government knows what you're showing me. And I
13 assume they have it as well.

14 MR. MENCHEL: Do you need a copy? I can give you a
15 copy.

16 MR. McCONNELL: Sure. We'll take one.

17 THE COURT: I think we're talking about
18 Document 162-1, but I will use the copy you gave me.

19 MR. MENCHEL: Very well.

20 THE COURT: Okay. Go ahead.

21 MR. MENCHEL: Yes.

22 So, Your Honor, if you start off on page -- there's
23 no page, but if you start off on paragraph 23 in the search
24 warrant affidavit -- I'm referring, just to be clear for the
25 record, that the affidavit that I'm referring to is the one

1 filed by Agent Kougemitros. I have might have botched that,
2 but that's the warrant I'm referring to.

3 THE COURT: Was that public?

4 MS. ELBERT: I believe we partially unsealed it for
5 the purposes of discovery, but I don't believe it's publicly
6 available on the docket.

7 THE COURT: Okay.

8 I have paragraph 23 under the heading GPB Capital
9 Holdings.

10 Is that where you would like me to look?

11 MR. MENCHEL: Yes.

12 THE COURT: Okay. Go ahead.

13 MR. MENCHEL: So in paragraph 23, the Government --
14 and in 24 -- it lays out information that GPB provided to
15 investors, and then contrasts that with what's in
16 paragraphs 25 and 26.

17 So, in other words, it says, for example, that -- on
18 paragraph 23, for example, in a PowerPoint presentation dated
19 June 3, 2014, GPB entity GPB Capital Holdings, LLC wrote,
20 quote, annual dividend, dash, 8 percent paid, 100 percent
21 funds from operation, closed quote.

22 And then it goes on to do something similar in
23 paragraph 24 when it highlights 10.5 percent fully covered
24 with the funds from operations.

25 And then in comparison to those two paragraphs,

1 which is put in the affidavit to show this is what they told
2 the investors. They put paragraph 25 and 26 to show that this
3 is the truth, okay?

4 THE COURT: So which are the statements that you are
5 saying specifically are false? The statement you just read in
6 paragraph 23?

7 MR. MENCHEL: No. 25 and 26. I'm just giving you
8 context to understand the falsity of it.

9 THE COURT: The context may be helpful, but, first,
10 I need to you very clearly state what are the material
11 misrepresentations that you are alleging.

12 MR. MENCHEL: It's 25 and 26.

13 THE COURT: Okay. Thank you.

14 MR. MENCHEL: In its audited financial statements
15 for 2014 -- this is paragraph 25 -- however, GPB Capital
16 Holdings represented that it paid approximately \$2,214,778 in
17 distributions but received income of only approximately
18 23,403.

19 What is misleading about this is that this entire
20 scheme that's alleged is that GPB Capital was paying
21 investors, in distributions, more money than it was taking in
22 in income, and it did not tell them that. The problem with
23 paragraphs 25 and 26 is that GPB Capital Holdings is not a
24 fund. It is the asset management company that we were just
25 discussing a few moments ago that's wholly owned by

1 Mr. Gentile. And I have with me the audited financial
2 statements that they relied upon that I would like to hand up
3 where what you can see is there's a distribution made to
4 exactly one person -- David Gentile -- because he's the only
5 one that is entitled to any distribution. There is no fraud
6 in GPB Capital Holdings.

7 This was misleading to the magistrate because, if
8 you read this, you would have thought, by comparing the
9 financials of GPB Capital Holdings to what GPB Capital
10 Holdings was talking about with its funds, that there was a
11 discrepancy. It's right there in black and white that this
12 was a distribution made to the member. There's only one
13 member. That's Mr. Gentile. So this was reckless and
14 misleading to the magistrate, and it was used to pump up this
15 idea that there's some wide-ranging fraud. I can hand up the
16 document to show you.

17 THE COURT: Is it in the record?

18 MR. MENCHEL: We attached it as Exhibit E, Your
19 Honor.

20 THE COURT: Okay. I don't need another copy -- but
21 thank you -- if it's already something you have in your motion
22 papers.

23 MR. MENCHEL: Yeah. And we -- you know, we were
24 criticized by the Government in providing hundreds of pages,
25 but we were just being complete. It's a single page that

1 says: Distributions to member. And it correlates to this
2 2,214,778.

3 Paragraph 26 is exactly the same. In paragraph 26,
4 they once again say: That for the audited financial
5 statements for 2015, GPB Capital Holdings reported that it
6 made approximately \$4,853,957 in distributions but earned only
7 approximately \$1,904,043 from its operations.

8 In other words, a fraud.

9 Once again, Your Honor, the only person that got
10 distributions in GPB Capital Holdings was David Gentile -- no
11 investor -- so this was misleading.

12 The second way in which it's misleading, Your Honor,
13 is that there is no standard or defined metric to determine
14 what they call "coverage ratio" between distributions paid to
15 investors and what is referred to multiple times as "income
16 from operations" or "profits." They use different terminology
17 in the affidavit. That should have been told to the
18 magistrate. This is not a gap methodology that is commonly
19 accepted in the industry.

20 And the problem with what the Government did was,
21 they used different numbers in the same audited financial
22 statements for different periods of time when it suited their
23 purposes, so I would like to show you some examples of that,
24 if I may.

25 THE COURT: As long as it is in the record, go

1 ahead.

2 MR. MENCHEL: It's in the record.

3 If you go to paragraph 29 of the affidavit, it says:
4 In its audited financial statements for 2014, GPB Automotive
5 made approximately \$792,933 in distributions and recorded
6 approximately \$1,011,988 in net operating income.

7 When you go to the actual audited financial
8 statements for that period of time, you will see that the
9 actual -- give me one second, Your Honor.

10 THE COURT: Sure.

11 MR. MENCHEL: We did attach this as an exhibit.

12 THE COURT: Did or did not? I didn't hear you.

13 MR. MENCHEL: This was produced to the Government,
14 but it is not in the record.

15 MR. COLTON: I'm sorry, Your Honor, we put it in, so
16 it is in the record.

17 THE COURT: I don't know what the "it" is yet.

18 MR. COLTON: Sorry.

19 The financial statements for Auto that Mr. Menchel
20 is citing to is in the record -- I'm just trying to be helpful
21 here -- which is 147-4, Exhibit D, I believe. Actually that's
22 2014. Exhibit D is the -- to my declaration, 147 has the
23 financial statements for Auto that he's citing.

24 THE COURT: Thank you.

25 MR. MENCHEL: When you look at those audited

1 financial statements, the number that represents \$1,011,988 in
2 what they call "net operating income" is referred to in the
3 audited financial statements as "net investment income," okay?
4 That's the metric they use there.

5 But if you go to paragraph 45 of the affidavit, it
6 says: For the period from its inception on April 13th, 2015,
7 to December 31st, 2015, GPB Holdings II -- so another fund
8 now, Your Honor -- reported net operating income of 645,632
9 during the same period the fund reported distributions of
10 \$197,056.

11 But if you actually look at the audited financial
12 statements, they use "net income," not "net investment income"
13 as the metric there. So they're flipping and flopping back
14 and forth between different metrics on different dates.

15 And then when you go to paragraph 41, Your Honor, in
16 the affidavit -- we're talking about the 2015 audited
17 financial statements of GPB Holdings I, they write: In its
18 2015 audited financial statements, however, GPB Holdings
19 reported distributions of \$12,345,630 and income of
20 approximately 12,210,192.

21 And, again, they're using this to make the point the
22 funds were upsidedown.

23 However, when you go to the financial statements
24 that they actually rely upon in the affidavit and you use net
25 income, the same metric they just used in the prior paragraph,

1 you get \$32,725,362. Had they used that metric, it would have
2 showed that the fund was more than capable of supplying the
3 actual amount.

4 Furthermore, Your Honor, the \$12 million that they
5 reference here -- the \$12,210,190 in income -- we can't find
6 that at all in the financial statement. It's just not a
7 number that we see, so if the Government knows where it is, I
8 would be happy to hear it. But, having reviewed this, we
9 cannot find this.

10 So they're using different numbers at different
11 periods of time. They're not telling the magistrate that
12 there is no generally-accepted metric to use, and then they
13 use whichever ones they want indiscriminantly. So that's
14 another part of the affidavit that we think is misleading.

15 THE COURT: Okay. But the failure to inform that
16 there's no gap, under your position, is not a
17 misrepresentation; it's an omission, right?

18 MR. MENCHEL: That's true.

19 THE COURT: Okay. So I'm really focussing now on
20 misrepresentations.

21 Is there anything else? You pointed me to a few
22 that you are alleging are misrepresentations based on the
23 affidavit, but is there anything else you want to raise? If
24 not, I am going to move on to other issues.

25 MR. MENCHEL: Okay. Just one last one.

1 THE COURT: Yes.

2 MR. MENCHEL: I think it's paragraph -- well -- no,
3 I don't know -- I don't know if it fits -- it's paragraph 21,
4 and I don't know which bucket this fits, to be candid, because
5 what paragraph 21 says: In reality, based on a review of
6 audited financial statements for GPB -- let me just stop
7 there. GPB, I don't know if they mean -- I don't know what
8 they mean. For 2014, GPB collectively paid over two million
9 more in distributions than they earned from the operations of
10 their assets.

11 The reason why I say I don't know which bucket it
12 fits into, Your Honor, is I don't know how they got this
13 number, and they don't tell the magistrate. I can't find it.
14 I can't tie it to anything. So it's an omission in the sense
15 that they didn't provide the methodology for it. I think it's
16 misleading, but I don't know because I don't know how they got
17 to the number.

18 THE COURT: Thank you.

19 Let me turn to the Government.

20 It's not necessary for you to respond to this if you
21 don't have anything additional to add from what's in your
22 papers, but if you want to respond on the specific
23 misrepresentations that your adversary has highlighted, I will
24 hear you out.

25 MR. McCONNELL: I think, just generally, Your Honor,

1 these are trial defenses. They are not appropriate in the
2 probable cause context, which, again, it's not de novo review.
3 The idea that these different definitions or different
4 accounting methodologies are somehow reflective of reckless
5 disregard for the truth, I think, are belied by the highly
6 detailed explanation that was just given.

7 But, factually speaking, I'm not sure what audited
8 financials are being relied on here. They were not produced
9 for fiscal years 2018 and 2019. And GPB, itself, said that
10 years 2015 and 2016 had to be re-audited, and they were never
11 done, so I think there's a factual issue there.

12 But even assuming everything that counsel says is
13 true and there's some reckless disregard in the accounting
14 methodology that the Government employed and articulated in
15 the affidavit, the remedy is the Court must excise that from
16 the warrant and make its own determination about whether or
17 not probable cause is still met. And there's a variety of
18 other evidentiary basis that the defense doesn't even touch.
19 They don't touch it in their briefing, they haven't asked
20 about it in their oral argument, but there's information from
21 high level GPB employees that speak directly to the offense
22 conduct. There are the issue of the performance guarantees,
23 which really is the foundation of the house of cards on which
24 the audited financials are built. They don't address that at
25 all. And they don't address their own admissions -- and there

1 I'm using GPB in the corporate context -- where the marketing
2 materials are consistently updated when failure to meet the
3 target coverage ratio or distributions -- however you
4 calculate them -- are met, and that's outlined in the
5 affidavit itself.

6 So, again, for all those reasons, I think this --
7 the argument -- while appropriate to make in front of a jury,
8 to be sure -- is not the correct one, given the standard we're
9 operating under.

10 THE COURT: Okay. Let me turn to another issue with
11 respect to these warrants.

12 In your motion, Mr. Gentile asserts that the
13 Government has continued to possess documents that the
14 Government has deemed nonresponsive to the GPB warrants. And
15 so I want the parties to comment on the legal significance, if
16 any, of the Government's retention of the documents and the
17 appropriate remedy, if any.

18 So let me turn to the Government, actually, to start
19 on that.

20 MR. McCONNELL: I think the terminology that's being
21 used is somewhat misleading. We're retaining them in the
22 sense that we physically possess them. We have made no
23 representations, nor would we, make the argument that we are
24 entitled to simply go back to that dataset and search it
25 whenever we want. We've told defense explicitly that. They

1 don't seem to accept that representation, but I think to call
2 that "retaining nonresponsive documents" is a bit misleading
3 given the fact that we're talking about electronic information
4 that was provided in such a way.

5 THE COURT: Thank you.

6 Any response?

7 MR. MENCHEL: Yes.

8 Your Honor, in March and April of 2021, the
9 Government provided a discovery letter in which it said that
10 it was making a production that -- collectively those were
11 about 492,000 documents. I would like to read to you -- did
12 we attach this as an exhibit? We cited in our papers, right?

13 The letter was cited in the response, Your Honor --
14 sorry, in the initial motion.

15 THE COURT: Sorry, I don't know what letter you are
16 referring to.

17 MR. MENCHEL: It was a production letter -- there
18 were two production letters made -- March and April, they say
19 the exact same thing --

20 THE COURT: Okay.

21 MR. MENCHEL: -- which collectively compiled 492,000
22 documents, approximately.

23 And what it said -- we cited this in our papers --
24 was the collection of materials being made available to you
25 today was generated by applying search terms designed to

1 isolate information relevant to the Government's investigation
2 of this matter as well as a privilege filter.

3 Not responsive to the warrant. That was not the
4 terminology that they used, but that it was documents that hit
5 upon the search terms that may be relevant to its
6 investigation. Relevant to its investigation is not the
7 standard. The standard is whether or not the documents that
8 were in your possession should have been retained, much less
9 produced, because they're responsive to the warrant.

10 In August of 2021 -- and this we also cited in our
11 papers -- they made -- they sent us an email regarding an
12 additional production in which they wrote the following --
13 this was August 27, 2021 -- the Government has completed its
14 review of the materials obtained from GPB's offices in
15 connection with the execution of the February 27th, 2019,
16 search warrants. Attached is a list of those documents that
17 the Government has, quote, deemed responsive to the warrant.

18 Actually, everything was a quote, but I wanted to
19 just emphasize that.

20 Deemed responsive to the warrant.

21 So by implication -- and, actually, in fact,
22 Ms. Elbert admitted as much at the last hearing we had -- the
23 initial tranche of 492,000 documents was not necessarily
24 responsive, it just hit on search terms, and we're providing
25 it to you.

1 That was a violation of the Fourth Amendment. They
2 chose to get these documents through a search warrant and, as
3 such, they only had a right to seize, ultimately, the
4 documents that were authorized by the search warrant. By
5 their own admission, they've not only kept them, but they've
6 produced them to Mr. Lash, they've produced them to
7 Mr. Schneider. We've asked them, by the way, whether they
8 produced them to any third parties, including the SEC, they
9 told us we have no right to know that information, and if they
10 have, that's extremely troubling.

11 So it's not just their retention -- which, by the
12 way, the *Metter* case makes crystal clear. You can't just hold
13 on to this stuff, okay? You have to make a determination as
14 to whether it's responsive, and you have to do that
15 determination within a reasonable period of time.

16 According to this letter on August 27th, 2021, two
17 and a half years had lapsed from when they actually executed
18 the search warrants to when they, quote, finished or deemed
19 the responsive materials to the warrant on August 27, 2021.
20 That's a separate violation for why we think it's unreasonable
21 under the Fourth Amendment. It's way too long to have that
22 material.

23 But their continued retention, which Ms. Elbert, in
24 the last hearing, said was nothing but -- is sort of an
25 illusory distinction because -- I think she said, quote, we

1 have them, so we have them.

2 With all respect to her -- and I have a lot of
3 respect for her, and I'm not trying to denigrate Ms. Elbert,
4 but that represents a fundamental misunderstanding of the
5 Fourth Amendment. It's not like you got this through a
6 subpoena. You chose this tactic of using a warrant, which you
7 are entitled to do, okay, but when you are, you are bound by
8 restrictions of the Fourth Amendment. And, in this case, what
9 you have deemed responsive, not just in the interest of full
10 disclosure -- and that may be where this is coming from. I
11 think that was the same attitude that the *Metter* prosecutors
12 took, the same office, which was: We are just going to turn
13 everything over.

14 THE COURT: We can talk about *Metter*, or not. In
15 *Metter* -- I think the parties have done a good job of setting
16 forth in their papers their differing positions on *Metter*, so
17 I don't think I need to hear more about *Metter* now.

18 MR. MENCHEL: Have I answered your question?

19 THE COURT: Yes, you have. You have.

20 Do you want to respond, Ms. Elbert?

21 MS. ELBERT: Yes. I want to clarify factually.

22 So following the unsealing of the indictment in this
23 case and the arrests, in an effort to produce discovery
24 quickly, and in an effort to make sure that any material that
25 might be useful to the defense would be turned over promptly,

1 we turned over what we have previously, I think, deemed, like,
2 a first cut on responsiveness, which is we applied search
3 terms to try to distill the materials down to those items most
4 likely to be responsive. Those are what we produced to the
5 defense. Those are what we reviewed ourselves. We then
6 completed our review and we identified for the defense what
7 documents we had deemed that were responsive to the warrant.

8 We had represented to them before -- and I will do
9 so again today -- that as far as the prosecution team is
10 concerned, we only have access to those responsive documents.
11 The FBI has retained a complete data copy of what was obtained
12 from GPB's offices for the purposes of data preservation
13 pursuant to their policy because we might have to prove
14 authenticity, chain of custody, all of those things, but in
15 terms of what is actually being reviewed from the point that
16 we completed our review, we are limited to what we have
17 designated as responsive in compliance with the two-step
18 warrant process.

19 THE COURT: Thank you.

20 I'm going to go on to something else, and if there's
21 something that you think is crucial that needs to be raised
22 later, but I think we may end up covering some of these other
23 point -- there's some overlap in the motions, and I think in
24 the -- certainly the legal issues, so we can move on.

25 Mr. Gentile represents that he's identified a

1 significant number of documents in his review of the warrant
2 returns that included his name and certain common privileged
3 terms.

4 So I'm going to ask the Government to respond to
5 that, and if there's any explanation or anything you want to
6 add about your privilege review, you can do that, but this is
7 what he's representing.

8 MS. ELBERT: In order to conduct our privilege
9 review, we ran a list of all attorneys known to us and -- that
10 were identified to us by counsel for GPB at that time. I
11 think we got into this a bit during our litigation over the
12 502(d) order. They provided a five- or six-page list of
13 attorneys, non-attorney consultants. We included everyone. I
14 think anyone who has operated in private practice is aware
15 that documents get stamped with headers for saying -- for
16 using privileged terms that don't, in fact, have any relation
17 to whether the underlying material is privileged, so what we
18 did was excise communications with all attorneys or
19 consultants that were identified to us by counsel to the fund
20 whose documents these were.

21 THE COURT: Thank you.

22 So in his motion, Mr. Gentile also argues that the
23 Government unreasonably delayed execution of the GPB warrants.
24 And the Government has argued, among other things, that
25 defendant has failed to demonstrate that he suffered any

1 prejudice as a result of any perceived delay.

2 So let me talk to Mr. Gentile's counsel. If you
3 could provide, you know, more specific information as to what
4 prejudice you've suffered as a result of this purported delay.
5 Or, alternatively, why defendant need not demonstrate
6 prejudice here.

7 MR. MENCHEL: Yeah, I'm going to, I think, first
8 address the latter because I think that's what's applicable,
9 with all respect.

10 The case law involving Fourth Amendment search and
11 seizure does not turn on prejudice to the defendant. It's to
12 deter bad law enforcement conduct. And there are case law --
13 we provided a bunch of it -- and I know Your Honor is familiar
14 with it -- that if the delay is unreasonable, that, in and of
15 itself, is a violation of Fourth Amendment. There's no
16 requirement that a defendant has to show personal prejudice
17 from the delay. The harm that's occurred is the fact that
18 documents that we assert belong to Mr. Gentile by virtue of
19 him being the owner of the company were in the possession and
20 custody and control of the U.S. Government for longer than the
21 Fourth Amendment allows.

22 I would say, however --

23 THE COURT: But that argument sounds like you're
24 making -- you're, sort of, blending the two concepts --
25 right? -- of the deterring misconduct and also harm to your

1 client.

2 MR. MENCHEL: What I'm saying is, I can't tell
3 you -- well, in the context of what I'm answering right now, I
4 think there might be prejudice. I will address that. Not
5 prejudice in the context of defending the case, but I do think
6 there's harm from a societal point of view that a defendant's
7 materials are being kept away from him, even if they have been
8 returned. As the *Metter* case says, retention of the document
9 is as bad as whether you return the original or not. You are
10 retaining it.

11 But in terms of prejudice, there may be prejudice
12 that I think justifies a hearing in this case, and I say that
13 because depending upon what other individuals received these
14 documents -- these 492,000 documents that we claim never
15 should have been turned over to anyone -- there may be some
16 potential real prejudice there.

17 And if I can go sidebar on this particular issue, I
18 would prefer to do that.

19 THE COURT: Let's hold off on that.

20 MR. MENCHEL: Okay.

21 THE COURT: But I hear the distinctions you are
22 making here.

23 MR. MENCHEL: Okay. Thank you.

24 THE COURT: Does the Government want to be heard on
25 this prejudice point?

1 MR. McCONNELL: I disagree that the time frame is
2 not eminently reasonable. Our first production was less than
3 two months -- less than two months after arrest and
4 indictment.

5 And on the issue of the necessity of prejudice
6 that -- there has to be a showing of prejudice. The purpose
7 of suppression is to deter behavior. This argument is
8 somewhat recycled from the one that was made during the 502(d)
9 litigation, and there's no prejudice or improper conduct to
10 deter.

11 THE COURT: Can I turn now to Defendant Schneider's
12 argument, that he has standing to join in Mr. Gentile's motion
13 to suppress the materials seized in February 2019 pursuant to
14 those searches.

15 You know, again, we, I think, hit on this.

16 You claim that because the Government, in your view,
17 did not contest your assertion of standing, that the
18 Government has therefore conceded it.

19 I will hear you briefly on that, and then I want to
20 turn to the Government on that.

21 MR. COLTON: So, Your Honor, we -- do you want me to
22 just address the waiver point or the basis for standing and
23 the waiver point?

24 THE COURT: Both.

25 MR. COLTON: Thank you.

1 So the basis for standing, it is now uncontradicted
2 in the record that in this very investigation, the law firm of
3 Herrick Feinstein represented both GPB Capital and Ascendant
4 Capital, the company that's 100 percent owned by Jeffry
5 Schneider. It is black-letter law that when two parties are
6 represented by the same counsel in a matter, they are both
7 entitled -- they reasonably and legally have a right to
8 privacy in those materials.

9 So it is undoubted that to the extent that there is
10 any communication that relates to that joint investigation,
11 which there surely is on the GPB servers, which were surely
12 taken by the Government, Mr. Schneider has an expectation of
13 privacy and thus has a Fourth Amendment right to be sure that
14 all of the requirements of the Fourth Amendment are met:
15 reasonableness, particularity supported by probable cause,
16 lack of misrepresentations to the magistrate, et cetera.

17 So, here, at least as a -- some set of the
18 materials, I think it's undeniable that Mr. Schneider had an
19 expectation of privacy in at least some of the materials that
20 would be resident on the GPB servers that were searched.

21 I will admit this is not in the record, but after
22 the end of the 502(d) litigation and we got access to more
23 material that nobody in this room had, only the taint team
24 had, we have discovered other evidence of even further joint
25 representations of both Mr. Schneider, GPB and Ascendant, by

1 Herrick Feinstein, which would then increase the period of
2 time -- which, of course, we would be happy to make a
3 subsequent submission or prove it up at an evidentiary
4 hearing, if one is ordered. But at least as to some
5 expectation of privacy, it is black-letter law that one party,
6 when there are two parties represented -- by the same
7 lawyer -- one party cannot waive the privilege for the other.
8 Same as with common interest. Same thing, black-letter law,
9 one party to the common interest can't waive it for everybody.

10 So, here, even if GPB didn't assert the privilege,
11 it doesn't matter, because Mr. Schneider and his
12 100 percent-owned company do, and there is a reasonable
13 expectation of privacy in your privileged communications.

14 THE COURT: Do you want to speak on the waiver
15 issue?

16 MR. COLTON: Yes.

17 As far as the waiver, I think it's incumbent upon
18 the Government to address an argument. We argued we had
19 standing; the Government didn't respond to it. So I think it
20 would be inappropriate to raise new arguments right now, but
21 obviously I defer to the Court if the Court chooses to hear
22 any new arguments.

23 THE COURT: I turn to the Government for any
24 response on the issue of standing by Mr. Schneider.

25 MR. McCONNELL: We don't agree that we've conceded

1 anything simply by not responding to it, first of all.

2 And, second of all, as we outlined thoroughly during
3 the 502(d) litigation, we do not accept the joint
4 representation on arguments that have been made to this point.

5 THE COURT: Okay. Let's move on to Mr. Schneider's
6 motion to suppress the fruits of the Google search warrant.

7 Well, go ahead. Let's do that.

8 You argue that the affidavit underlying that warrant
9 contained -- contains mis- -- contained material
10 misrepresentations and omissions. And, again, I want to
11 focus, as I did with Mr. Gentile's counsel, on what are you
12 alleging are the material misrepresentations as distinct from
13 any omissions?

14 MR. COLTON: Certainly, Your Honor.

15 And just, if I may, when I stood up earlier when
16 Mr. Menchel was arguing, I noted that I said Exhibit D, 147-4.
17 That's the 2015 Auto financials. Exhibits C, 147-3, is the
18 2014, so I misspoke, but I just want to correct that on the
19 record --

20 THE COURT: Thank you.

21 MR. COLTON: -- so the Court later can find what
22 we're referring to.

23 THE COURT: Okay. Go ahead.

24 MR. COLTON: With respect to the Court's question
25 about misrepresentations, there are many. There are also many

1 omissions. I will hold that, at the Court's request.

2 In the affidavit, the Government affirmatively, in
3 paragraph 15 of the affidavit for the Google warrant, quotes
4 an email and says that Auto Portfolio is only going to be
5 covered at 70 percent, and actively removes the exculpatory
6 information from that email that says, in no uncertain terms,
7 that Holdings I's coverage was over a hundred percent. By
8 altering that email and hiding the exculpatory evidence from
9 the magistrate judge, that is a stark misrepresentation of the
10 email, and it's an argument to which the Government has not
11 responded, and has not provided any basis for how they chose
12 to use half an email and hide the exculpatory information in
13 the other half of the email on an issue directly raised --

14 THE COURT: You are talking about the 103 percent
15 reference, right?

16 MR. COLTON: 100.3 percent.

17 THE COURT: Sorry, 100.3.

18 MR. COLTON: Yes.

19 THE COURT: Tell me exactly what you think is a
20 misstatement about what the Government had in the affidavit.

21 MR. COLTON: The Government tells the magistrate
22 judge that these distributions could not have been covered.
23 The Government tells the magistrate judge that this email is
24 stark evidence of the falsity of the representations of the
25 source of distributions, while at the same time cutting out

1 from that email direct evidence that the distributions were
2 indeed properly derived from income or cash flow. You don't
3 get to hide exculpatory information from half a document and
4 use the other half of the document. You might be allowed to
5 tell the magistrate: Here's the whole thing, and here's why
6 you shouldn't credit half of it. You can do that. But you
7 can't hide exculpatory information. The case law makes it
8 clear that that's an affirmative act of bad faith. And,
9 indeed, the Second Circuit makes clear that you can't even fit
10 within *Leon* if you actively hide exculpatory information from
11 the magistrate.

12 THE COURT: Okay. What other material
13 misrepresentations are you alleging?

14 MR. COLTON: In paragraph 14 of the affidavit at
15 issue, the Government makes the express statement that
16 financial records for the fund reflect distributions could not
17 have come from cash flow from operations. Could not have come
18 from cash flow from operations for both -- for the Auto
19 Portfolio for 2014 and 2015. It's undisputed that the
20 Government uses as one of the measures -- and that the
21 Government got multiple search warrants with this measure --
22 the question of comparing net income -- or loss -- to
23 distributions.

24 However, despite the express and direct
25 representation that distributions could not have come from

1 cash flow, based on the financial records, the financial
2 records show exactly the opposite. The financial records of
3 Auto Portfolio -- Exhibit C at pages 6, 7 -- that would be
4 147-3 of pages 6, 7 -- show net income at approximately
5 \$1.9 million and distributions at \$790,000 -- could not have
6 come -- is out and out false.

7 The Government, in that same paragraph 14, makes the
8 same representation about Auto Portfolio in 2015: Could not
9 have come. But yet the financial statement on which they rely
10 to shows it absolutely could have come from proper sources.
11 That's page 147-4, Exhibit D, page 6. Net income of
12 \$5.091 million, distribution only 4.729.

13 Again, the Government was entitled to be forthcoming
14 with the magistrate and say: Don't trust these numbers, trust
15 these other numbers, and here's why. The Government was not
16 entitled to hide those numbers and make false representations
17 about what the numbers mean and what they could or could not
18 show. That should never have been stated so specifically, so
19 falsely, and that information should not have been hidden from
20 the magistrate.

21 Moreover, Your Honor, the Government cites to a
22 draft email from 2016 about the fund Holdings I and says:
23 This draft email shows that as of sometime in 2016 -- late
24 2016 -- coverage was only 82 percent. But that's -- it's hard
25 to know whether that's an omission or a misstatement.

1 Sometimes the line is a little bit blurred. But the financial
2 statements for Holdings I show that for 2014 and 2015, the net
3 income was over 19 and a half million dollars more than the
4 distributions, and the financial statements show that no new
5 investment was taken in in 2016.

6 So that is misleading. I'm not a hundred percent
7 sure whether I call that an omission or a mission statement,
8 but I certainly call it substantially misleading.

9 Moreover -- I have to find the exact paragraph.

10 Sorry, Your Honor.

11 THE COURT: That's okay.

12 While you're looking for that, your adversary had
13 referenced that the warrant also includes information about
14 other GPB -- I guess about or coming from other GPB employees.
15 So how, if at all, does that interact -- that information
16 interact with the information you're talking about in terms of
17 a materiality analysis?

18 MR. COLTON: That argument -- I'm sure the
19 Government will confirm for Your Honor -- relates to the
20 affidavits submitted to the magistrate to get the GPB
21 warrants.

22 The affidavit at issue here says nothing about
23 talking to GPB employees. And all it says about talking to
24 Ascendant employees is that Mr. Schneider and Gentile focused
25 on the fact that distributions were covered. Well, that fact

1 is absolutely not anything other than exculpatory if they
2 were, in fact, covered as all of the evidence I just listed
3 shows they were.

4 THE COURT: If there's any more material
5 misstatements you wanted to bring to my attention, if not, I
6 want to move on to your point about unreasonable delay and the
7 execution of this Google search warrant.

8 MR. COLTON: So there is, Your Honor. I'm going
9 to --

10 THE COURT: Okay.

11 MR. COLTON: -- find it quickly.

12 THE COURT: Sure.

13 MR. COLTON: In paragraph 17 of the affidavit, the
14 Government quotes a portion of a letter that GPB issued for
15 the proposition that, quote, all of the company's
16 distributions made to date have been a return of capital
17 contributions made to the company's investors.

18 This is an active misstatement because it excises
19 critical information from that statement that changes its
20 meaning. The full statement, in relevant part, reads as
21 follows -- and I will try to do this slowly -- in accordance
22 with the first step of the company's distribution waterfall
23 that is set forth in the company's limited partnership
24 agreement as amended to date, all of the company's
25 distributions made to date have been a return of capital

1 contributions made to the company's investors.

2 And here's the critical part cut out.

3 The source of these return of capital distributions
4 have included, and may in the future continue to include, cash
5 flow from operations and investor contributions.

6 So when you say GPB admitted it's all investor
7 capital, and the next sentence says it's not all investor
8 capital, that, alone, makes that use of the note misleading.

9 But it's worse, Your Honor, because this doesn't
10 refer at all to the question of the actual source of
11 distributions year to year or over the life. It refers to a
12 specific calculation of a waterfall. And what a waterfall is,
13 is there's a right of GPB, in addition -- in its documents --
14 undisputed -- that in addition to its management fee, if
15 there's profits over a certain point, GPB gets to share in
16 those profits. But, quite understandably in the waterfall,
17 GPB doesn't get to share in those profits until the investors
18 all get their money back and their profits.

19 So in calculating when in the waterfall GPB gets a
20 piece of profits, GPB, beneficially to the investor, says:
21 There's no profits for me, GPB, until you, investor, get it
22 all back plus your profits.

23 That's what this letter was talking about, and the
24 Government excised it, edited it, and changed its meaning to
25 become insidious. That's a misrepresentation. They could

1 have given the whole letter to the magistrate. They chose not
2 to, they chose to mischaracterize it, and that's a
3 misstatement. And that helped them get the warrant.

4 I do have additional misstatements. Omissions I'm
5 leaving out. There are also substantial misstatements to the
6 magistrate judge to obtain the nondisclosure order that came
7 with the warrant. I'm happy to address those, or if the Court
8 was going to take that up later, I can wait.

9 THE COURT: I wasn't necessarily going to take that
10 later, but I think that you made your position in your papers
11 clear on that. If there's something you want to add on that
12 point, but I don't know that I need to hear the repeat.

13 MR. COLTON: I think we'll rely on the papers on
14 that point, then, Your Honor.

15 THE COURT: If the Government wants to respond -- I
16 don't know that you will find it necessary, but you're
17 certainly welcome to respond to these particular paragraphs
18 that your adversary has mentioned. I understand your more
19 general point from you papers about what the purpose of the
20 search warrant is, what the probable cause standard is, that
21 it's not putting every fact the Government knows, but if
22 there's something specific you want to respond to, based on
23 what you have heard as to these identified misrepresentations,
24 I will certainly hear you out.

25 Take a moment if you need it.

1 MR. MARSHALL: Nothing further from the Government
2 on that point, Your Honor.

3 THE COURT: Okay.

4 Well, let me, then, ask the question of
5 Mr. Schneider similar to what I asked of -- sorry,
6 Mr. Schneider's counsel -- similar to what I have asked of
7 Mr. Gentile's counsel about your argument about there being an
8 unreasonable delay in executing this -- this -- for an
9 execution of the warrant here.

10 And I know the Government's response is that you
11 haven't shown any prejudice as a result of any perceived
12 delay, but, again, if you want to comment on the prejudice or,
13 as your -- as your -- you know, Mr. Gentile's counsel did talk
14 about why perhaps you don't have to show prejudice.

15 MR. COLTON: So we would adopt the arguments that
16 Mr. Menchel made on behalf of Mr. Gentile that we don't have
17 to demonstrate prejudice, that a violation of the Fourth
18 Amendment is something --

19 (Court reporter requested clarification.)

20 MR. COLTON: -- demonstrate prejudice.

21 I promised my colleagues I wouldn't get stopped
22 today for going too fast, and I did, so I'm sorry.

23 And that -- but that we can certainly demonstrate
24 prejudice here.

25 The Supreme Court and the Second Circuit have made

1 it clear that electronic searches of people's phones, private
2 email accounts, contain the most sensitive information, their
3 most private information. And what happened here is that the
4 Government executed the warrant in still -- in mystery. We
5 don't know how they determined what was supposedly, quote,
6 relevant to the investigation; how they ended up seizing,
7 looking at, reviewing, 70 some-odd percent of the documents
8 that were seized; how they determined what was responsive, and
9 all of Mr. Schneider's most private information was under
10 review for the Government for a lengthy period of time. That,
11 in and of itself, is prejudice. That, in and of itself, is a
12 violation of privacy if it's material that wasn't properly
13 obtained under the Fourth Amendment.

14 THE COURT: So Mr. Menchel had made the point of
15 harm versus prejudice in connection with the case. Are you
16 making that same type of argument? When you say "prejudice,"
17 do you mean in connection with defending this case, or do you
18 mean some other just, sort of, privacy harm?

19 MR. COLTON: I think there are both. The argument I
20 just made is about the, you know, general harm to one's right
21 to privacy, which is the quintessential interest the Fourth
22 Amendment is designed to protect.

23 But here, by virtue of overseizure, the Government
24 actually accidentally produced some of Mr. Schneider's very
25 private, personal, privileged material to Mr. Lash, which, in

1 and of itself -- and to Mr. Gentile -- which, in and of
2 itself, is a harm -- certainly, a major harm -- and I have no
3 idea how that might be used. And the harm is exacerbated by
4 what I anticipate Mr. Menchel would like to discuss at
5 sidebar, and I will leave it until that happens. I don't want
6 to be cryptic, but I would rather the Court tell me, go ahead
7 and say it from the well than, too late, I said it from the
8 well.

9 THE COURT: Let me just make sure I'm understanding.
10 And I don't want, obviously, any details you are not looking
11 to share publicly or to share with you are adversary here, but
12 is what you and Mr. Menchel are referring to as more
13 information specifically on how the defense has been harmed or
14 prejudiced by what you perceive as delays, or improprieties,
15 in the way the Government has handled the search materials?

16 MR. COLTON: Yes.

17 THE COURT: I think what I will probably ask is that
18 that material be submitted in writing.

19 Is the Government going to have any issue with the
20 defense submitting something that is, you know, not for the
21 Government's eyes on this topic?

22 MR. COLTON: I'm sorry, Your Honor, may I correct --
23 the question is -- what we have to say is, we don't -- we're
24 not looking to keep from the Government. We're simply not
25 going to announce it publicly yet.

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1 THE COURT: Okay. I was not understanding it that
2 way.

3 MR. COLTON: But we're happy to write a letter under
4 seal or --

5 THE COURT: I think, in part, because, as a
6 practical matter, we have a lot to cover today, and this
7 proceeding could go on and on and on if we maybe take this
8 issue up, so I think I will ask for written submissions on
9 this if the parties are -- are -- I think that that is
10 feasible.

11 MR. COLTON: Happy to do that, Your Honor. I can't
12 speak for Mr. Menchel, but we are happy to.

13 MR. MENCHEL: That's fine. May I add one thing?

14 THE COURT: You may.

15 MR. MENCHEL: We had actually split up the arguments
16 before, and I didn't anticipate I was going to get Q and A
17 like this, which is fine.

18 The waterfall argument that Mr. Schneider's counsel
19 made applies with equal force in our papers -- in our
20 affidavits in paragraph 19. I just wanted to put that on the
21 record.

22 THE COURT: Okay.

23 Does the Government want to comment on the
24 submission that -- or submissions that we're talking about?

25 MS. ELBERT: The proposal to file submissions under

1 seal? No. I will see what they submit and propose a reply.

2 THE COURT: Okay.

3 MR. COLTON: Okay. So I think we were covering the
4 question of --

5 THE COURT: Harm.

6 MR. COLTON: -- harm, meaning general privacy harm
7 versus direct prejudice. There's direct prejudice, as I said,
8 from the Government producing materials to all defendants that
9 were privileged and stuff that they really should have never
10 held onto. And there's -- what we had in this case, to be
11 candid, of course, is we had a written negotiation with the
12 Government about whether they were allowed to hold onto some
13 of the material from the Google warrant that was non -- that
14 they deemed nonresponsive to the warrant. We came -- the
15 Government represented that they would keep it for evidentiary
16 purposes, as Ms. Elbert said -- authenticity purposes -- but
17 not access it, except in very limited circumstances, and it
18 got accessed, and it got sent to other defendants, and that
19 harm is worse than it appears right now, which we will
20 explain --

21 THE COURT: Okay.

22 MR. COLTON: -- in the submission.

23 THE COURT: Okay.

24 In your motion -- the Google search warrant
25 motion -- you assert that there in the -- in the application

1 for the warrant that an obstruction of justice statute was
2 cited, and -- even though there was no obstruction actually
3 alleged -- and the Government, in response, appears to concede
4 that the Google search warrant's reference to obstruction of
5 justice statute was mistaken.

6 So I would like the Government and Mr. Schneider's
7 counsel to comment on the legal significance of this and the
8 appropriate remedy, if any.

9 I think this can be something you cover pretty
10 quickly, so if you want to speak to that first.

11 MR. COLTON: It's a clear admission of the warrant
12 being overbroad, at least insofar as it seeks any evidence of
13 obstruction of justice. There's no evidence whatsoever
14 presented in the affidavit of obstruction of justice, and the
15 Government admits that fact, so the warrant is overbroad
16 insofar as it authorizes seizure of evidence of obstruction of
17 justice.

18 The Government makes the claim that they didn't
19 seize any information pursuant to that -- that authorization,
20 but we have no way to know whether that's true because we have
21 no idea how the Government exercised and, you know, carried
22 out this warrant. We don't know what search terms they used;
23 we don't know what they looked at; we don't know how they
24 looked at or what decisions they made, and there's not even
25 any evidentiary submission by the Government to back that up.

1 Moreover, if it turns out that material was seized
2 under that authorization, the Government can't just say "I
3 won't use that," because it's a question of the
4 improperly-seized material should be suppressed, and any fruit
5 of that poisonous tree, which, of course, the defense is in no
6 position to be able to evaluate at this time.

7 Now, of course, that's a small piece in a lot of
8 arguments that we've made --

9 THE COURT: Right.

10 MR. COLTON: -- but I'm just limiting my argument to
11 the question Your Honor asked.

12 THE COURT: Yes. Thank you. Thank you.

13 And, Ms. Elbert, or anybody else on the Government's
14 team, want to comment on this issue?

15 MR. MARSHALL: Your Honor, I believe this is
16 sufficiently covered in our submission. I just note that of
17 the, I believe, 390 documents that were ultimately seized from
18 the Google account, the Government has not seized any of
19 those, as defense counsel referenced, as evidence or fruits of
20 obstruction of justice, and have specifically only focused on
21 the other statutes, which were intentionally included in -- in
22 the attachment to the search warrant.

23 As a result, the -- to the extent any of those
24 documents would be evidence of obstruction of justice but not
25 evidence of any of the other offenses listed in the warrant,

1 it's sufficient for the Government to just not use those in
2 its case in chief at trial, and that more wide-ranging remedy
3 is unnecessary for the inadvertent inclusion of an additional
4 statute in the warrant.

5 THE COURT: Thank you.

6 I have the parties' positions on this.

7 MR. COLTON: Thirty seconds, if you don't mind, Your
8 Honor?

9 THE COURT: Go ahead.

10 MR. COLTON: I don't think the proper focus is the
11 390 documents that the Government eventually said they're
12 going to seek to admit, but it's the tens of thousands of
13 documents that the Government reviewed improperly. If any of
14 those 67,000 documents that the Government reviewed they chose
15 to review because of an alleged authorization to search for
16 obstruction of justice material, that any fruit of the tree --
17 the review of any of those 67,000 would need to be suppressed
18 because it's been admitted now that there was no probable
19 cause to support that authorization.

20 THE COURT: Thank you.

21 MR. MARSHALL: Your Honor, may I just briefly
22 respond to that?

23 THE COURT: Yes.

24 MR. MARSHALL: In determining which emails are
25 responsive to the warrant, Your Honor, the Government's

1 authorized in a two-step process to seize all of the material
2 from the -- to obtain all of the material from the account,
3 review it, and then in determining what is responsive to the
4 warrant, effectively seize those materials.

5 So the Government was allowed, whether or not there
6 was the obstruction of justice reference in the warrant, to do
7 a document by document review of every document from the
8 Google account returns. It's just the ultimate materials that
9 the Government decide -- determines are responsive that are
10 actually seized, so the 390 documents are the relevant set for
11 this issue, Your Honor.

12 THE COURT: Okay. We can move on to something else
13 now.

14 You know, both of your motions to suppress,
15 Mr. Schneider, you highlight that the Government has not
16 submitted affidavits or other evidence supporting its claims,
17 and I think we've touched on this a bit when we were talking
18 about the motion to suppress the testimony, but I want to know
19 if the Government has any additional comments on, you know,
20 the contention that your submissions are not sufficient --
21 factually sufficient.

22 MS. ELBERT: Yes, Your Honor. The only comment I
23 would make is to the extent Your Honor feels a sworn
24 statement, on top of a statement made by an officer of the
25 court in a court filing, is required. We can submit one that

1 hasn't been -- in my familiarity with the practice of this
2 district, we don't typically submit affidavits in support of
3 our statements and court filings. They're assumed to be made
4 in our best effort to be as accurate as possible, but to the
5 extent that Your Honor wishes that we supplement the record on
6 any of these motions, we can do so.

7 THE COURT: I mean, some of them -- some of the
8 criticism, I think, is not just about the Government not
9 making a sworn statement. I think there -- at least with
10 respect to the testimonial suppression motion, I think there's
11 a suggestion that perhaps there were some discussions with the
12 New Jersey and SEC folks, and that would not really -- I don't
13 think -- I don't think the criticism was, in that instance,
14 that it was -- well, maybe it was, I don't know, but that the
15 Government's was --

16 MS. ELBERT: It was directed at all of us, Your
17 Honor.

18 In that instance, in our view, even accepting the
19 facts as presented by the defense as true, there is no basis
20 for the asserted relief, and so we didn't -- for the purposes
21 of resolving the motion, we didn't feel there were any facts
22 that needed to be disputed or resolved. But, as we put in the
23 papers, we did consult with the New Jersey Bureau of
24 Securities and with the SEC. They did not wholeheartedly
25 subscribe to the depiction of the conversations that the

1 defense had with them. In our view, it's irrelevant, but if
2 Your Honor believes that it is relevant, we wanted to just
3 reserve our right to dispute those representations
4 subsequently, but I think the reason why we addressed it the
5 way that we did is that, even accepting all of those facts as
6 true, there was no basis for the relief sought, so there was
7 no need to get into a factual dispute about it.

8 THE COURT: Okay. I mean, look, the Government
9 responds to these motions in the way that the Government
10 chooses to respond to these motions, right? And I'm not --
11 you know, the Government -- the Court is not really looking to
12 give it -- the Government advice on how to litigate its
13 motions, right? So if the Government feels that it needs to
14 or wants to put something in, that's a different issue, but it
15 sounds like what the Government is saying is that what's in
16 the record from the Government's perspective is sufficient.

17 MS. ELBERT: Correct, Your Honor.

18 THE COURT: Okay. Give me one moment, please.

19 Let's turn to the joint motion to dismiss the
20 indictment.

21 In your response to that motion, the Government --
22 you argue that the motion is moot insofar as it concerns the
23 defendants' dispute with GPB over their entitlement to
24 advanced legal fees and expenses. And, of course, there's
25 different arguments, to some degree, being made by Mr. Gentile

1 and by Mr. Schneider, but, as I understand, your response is
2 that as to both, the motions are moot. And I think, as I
3 understand your argument, you're contending that the disputes
4 regarding legal fees have been resolved and that -- you're
5 suggesting that neither defendant's defense has been impaired
6 by virtue of these disputes.

7 Have I -- have I, in very general terms, captured
8 your argument?

9 MS. ELBERT: Yes. And, to be clear, the Government
10 has no visibility into the defendants' fee arrangements, or to
11 what extent their bills are getting paid.

12 Our -- our position is based on the representations
13 in the papers that we cited to suggesting that, as a result of
14 the Delaware Chancery Court ruling as to Mr. Schneider, it
15 appears GPB has been ordered to advance the fees, so at least
16 as to him, that appears to be resolved.

17 As to Mr. Gentile, it was less clear, but it
18 appeared that GPB had never taken the position that they
19 didn't have to advance fees, but that there were some delays
20 in payment, or some things weren't being covered, but there
21 were references in his papers as well to things now being
22 paid, and so it appeared as though this had been worked out.
23 And, from our perspective, given the evident ability of the
24 defense to conduct a vigorous representation to date, and the
25 fact that there's still no trial date in this case, it doesn't

1 seem as though the defendants' fair trial rights are going to
2 be implicated at this point in time, but I defer to the
3 defense. If there's ongoing fee issues, I'm not aware of
4 them.

5 THE COURT: Okay. I'm going to ask the defendants
6 if -- even in, sort of, high-level terms, because I understand
7 why you might not want to get into specifics, but can you
8 provide any further explanation as to how your defenses have
9 been impaired as a result of any fee disputes with GPB? And
10 maybe you can't, but I raise that as something you may want to
11 comment on.

12 Mr. Schneider's counsel is standing, so I will go to
13 you first.

14 MR. COLTON: Thank you, Your Honor.

15 Of course we're happy to go in any order you want.

16 THE COURT: That's fine. Go ahead.

17 MR. COLTON: So I'm going to answer Your Honor's
18 question for sure. I just want to note in context that the
19 Second Circuit has made clear in *Stein* that there is no need
20 for a defendant to make a particularized showing of how the
21 defense was impaired, but I am going --

22 THE COURT: I meant -- that's -- I asked you if you
23 wanted to.

24 MR. COLTON: Yes. And I'm going to do that. I'm
25 just making clear it's voluntarily as opposed to taking on a

1 burden.

2 THE COURT: Okay.

3 MR. COLTON: We did put in already in the papers the
4 example of how GPB, for a very lengthy period of time, held
5 over Mr. Schneider's head the prospect of taking away access
6 to the database that the Government referred to in their
7 papers. And in a case of this size, worth millions of
8 documents, literally, access to a database is mission
9 critical, so --

10 THE COURT: But is the argument there that an
11 attorney would forgo even starting down the path of working in
12 this database if it was going to be cut off later? Or is
13 there something else that you are arguing with that?

14 MR. COLTON: The argument would be that there's
15 certain level of investment of time, of coding, of creating
16 work product that you might not do if you weren't sure you
17 would have access to that work product. You might have to do
18 it all over again, especially in the context of having the
19 prospect of not having fees paid, we say, wrongfully that was
20 hanging over our head.

21 Moreover, the threat continues to this day. The
22 Government -- United States Government, in the form of the
23 SEC -- made a motion to appoint a receiver over GPB.
24 Mr. Schneider, who is a party to that case, filed a short
25 submission saying -- objecting to the receiver but saying that

1 even if a receiver is appointed, the Court's order should make
2 it clear that the Delaware Court orders ordering advancement
3 should be respected and advancement continued. The United
4 States Government, through the SEC, refused to agree to that.
5 So the United States Government has said in public filings
6 that if a receiver is appointed, the receiver will be free to
7 do whatever the receiver wants to do, which is a startling
8 statement, because the receiver that they proposed is the very
9 individual we've represented stood in the way of Mr. Schneider
10 getting the advancement we now know he was entitled to.

11 So, as we stand in the well of the courtroom today,
12 we do not have the certain and unlimited payment of legal fees
13 that *Stein*, in the Second Circuit, required in order to create
14 mootness or create a lack of prejudice. So we have both
15 actual prejudice, no need to prove prejudice, and the fact
16 that the Government continues to this day -- through the SEC
17 and their filings -- to hold it over our head as the prospect
18 that it may not continue.

19 THE COURT: Okay. Let me turn to Mr. Gentile's
20 counsel.

21 MR. BUCKLEY: Yes. Thank you, Your Honor.

22 So with regard to the arguments that Mr. Colton just
23 made, we submit that those apply equally to Mr. Gentile. In
24 particular, the fact that Mr. Gentile -- as *Stein* directed --
25 does not enjoy an unconditional right of access to fees by

1 virtue of this threat of receivership and the fact that the
2 receiver, in the Government's own words, is going to be the
3 one responsible for determining whether or not to abide by the
4 Delaware judgments.

5 In addition, specific to Mr. Gentile -- and this is
6 in our papers, so I won't belabor it, but Mr. Gentile is being
7 deprived of access to documents from his company, documents
8 that are important to his preparation for his defense, and is
9 being told that access to those documents now can only be
10 gained through compulsory process.

11 As outlined in the motion -- and I'm sure we'll get
12 to this in a moment, Judge, but as outlined in the motion, we
13 have set forth sufficient bases for the Court to conclude that
14 it is likely that the monitor has a role in depriving
15 Mr. Gentile of access to those documents, has a role in the
16 company's position with respect to Mr. Gentile, and based upon
17 the facts that we've asserted, we submit that further
18 evidentiary development is appropriate, including subpoenas
19 and a potential evidentiary hearing.

20 THE COURT: So you do bring me to my next question,
21 which is, the parties obviously disagree about whether the
22 monitor is a state actor here.

23 Is there anything more you want to comment on that?
24 I've read your papers on that point.

25 MR. BUCKLEY: Yes, Your Honor. I will go first,

1 but --

2 THE COURT: Go ahead.

3 MR. BUCKLEY: -- Mr. Colton is going to take the
4 lead.

5 So with regard to Mr. Gentile's view, we submit
6 that, as laid out in the section of the brief related to
7 Mr. Schneider, that there is sufficient grounds under the law
8 and under these facts to conclude that the monitor is a state
9 actor, but we think it is critical, with regard to
10 Mr. Gentile's claims here, that there is substantial evidence
11 to suggest that the monitor is working, at the very least, in
12 lockstep with the U.S. Government, if not at the direction of
13 the U.S. Government, and we've highlighted the various facts
14 that we submit support a reasonable belief such that a request
15 for subpoenas cannot be described as a fishing expedition.
16 They are pointed subpoenas, they are directed, and they have a
17 basis in fact that, if proven true, would be relevant to
18 additional claims by Mr. Gentile.

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1 THE COURT: Go ahead, counsel, Mr. Colton.

2 MR. COLTON: Just briefly, your Honor, I agree with
3 the points that Mr. Buckley made about the necessity for a
4 hearing. I think in Mr. Schneider's case we've laid out a
5 sufficient basis for dismissal under *Stein*, but even in *Stein*
6 we understand that Judge Kaplan ordered an evidentiary
7 hearing, ordered 17(c) subpoenas and Rule 16 discovery and did
8 so after the government made an express set of representations
9 as to the facts, and of course history has shown, it's a good
10 thing he did, because the facts came out differently than the
11 way that they were originally presented in the motions.

12 So here, we've certainly laid out substantial
13 information about the monitor's involvement, substantial
14 information about how the monitor and the government have been
15 in lockstep on every single litigation item --

16 THE COURT: Okay. So let me stop you on the word
17 lockstep. Why is lockstep not parallel as opposed to at the
18 direction of.

19 MR. COLTON: So the monitor put in an affidavit at
20 the request of the SEC and the SEC's motion to turn the
21 monitor into essentially an all powerful receiver. This is
22 not just they have the monitor doing his work and the SEC is
23 doing their work, they were working together to try to create
24 a situation where the monitor becomes the receiver who has a
25 right to take away Mr. Schneider's and Mr. Gentile's

1 advancement orders. By the way, both Mr. Schneider and
2 Mr. Gentile have Delaware court orders to that effect.

3 THE COURT: Okay. I want to hear from the
4 government on this point.

5 MS. ELBERT: Sure, your Honor. First, I understand
6 the point that the defense is making about how the SEC and the
7 DOJ are both bodies within the federal government, however,
8 just to correct Mr. Colton's representation that the monitor
9 has been in lockstep with the government, I don't believe he
10 is referring to the U.S. Attorney's Office for the Eastern
11 District, as the monitor had no role in the criminal matter,
12 but moreover, the SEC's statement that he's relying on in the
13 brief in the receivership motion, which I encourage the Court
14 to take a look at, is not a statement that the receiver, as he
15 phrased it, can do whatever he wants with regard to paying
16 legal fees. The SEC's position is that the receiver would be
17 empowered as the receiver would be in connection with the
18 finances of GPB more generally to make his own determination
19 as to GPB's legal obligations to pay the fees and that to the
20 extent that Mr. Gentile or Mr. Schneider disagreed with some
21 determination that the receiver made, they could bring that to
22 Judge Brodie. That's what the SEC says in the papers.

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(Continued on the next page.)

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1 (Continuing.)

2 MS. ELBERT: This is not a circumstance where the
3 SEC is saying that they want to impose the receivers, that the
4 receiver can stop paying the defendants' legal fees. That's
5 just not what they say in their public filing.

6 MR. COLTON: Just quickly, Your Honor.

7 THE COURT: Go ahead.

8 MR. COLTON: Two things.

9 One, we're not saying that the SEC moved for a
10 receiver to deprive defendants of legal fees. That is not
11 what we are saying. But we have presented substantial
12 evidence of the monitor standing in the way of advancement
13 being paid, and now that's the very same person who is being
14 proffered to be the receiver who the Government has the
15 power -- that the full United States has the power to say to
16 Judge Brodie: We agree, Judge, you should order that the
17 receiver respect the Delaware judgment and the United States
18 Government has refused to do so. That's -- all of that is
19 undisputed.

20 And with respect to Ms. Elbert's representation in
21 the well of the courtroom that the monitor has had, quote, no
22 role in the criminal process, we make the same argument that
23 we've made with respect to other competent evidence. We
24 should be entitled to get sworn testimony to that effect; to
25 get the relevant documents to that effect, because we have

1 reason to believe that that's not so, or the monitor has had
2 some connection, whether it's indirect or direct, in the
3 criminal process.

4 So I don't think it's okay or sufficient to
5 satisfy -- a hearing or a motion to just have a generalized
6 statement from the prosecutor. I am not impugning
7 Ms. Elbert's credibility or veracity in any way; I'm merely
8 saying that it's too broad a statement to be just relied upon
9 not in evidentiary form and not to be tested given the nature
10 of the allegations we've made.

11 THE COURT: Okay. So in the motion to dismiss,
12 there's the allegation that the monitor obstructed
13 Mr. Gentile's access to certain documents. But on what basis
14 does Mr. Gentile claim he's not only entitled to those
15 documents, but assuming that he was denied access to the
16 documents, why would dismissal of the indictment be an
17 appropriate remedy?

18 MR. BUCKLEY: Your Honor, with respect to that
19 specific question, just to be clear, Mr. Gentile is not, at
20 this juncture, seeking dismissal of the indictment. Rather he
21 is seeking discovery related to those questions.

22 THE COURT: Okay.

23 MR. BUCKLEY: If it can be shown, if the discovery
24 that we request pans out, as we suspect it may, then we think
25 that there is the potential; that this could give rise to the

1 dismissal of the indictment, because to the extent there is
2 interference, whether by the monitor acting as an agency of
3 the Government, or the SEC or the DOJ putting pressure on the
4 monitor to take certain steps with respect to Mr. Gentile's
5 access to documents from his own company that are important to
6 his preparation of the defense, we submit that that is
7 interference with his Sixth Amendment right.

8 THE COURT: But are you making the argument because
9 of the nature of the documents and the importance to the
10 defense, or are you making more of a per se kind of argument?

11 MR. BUCKLEY: So specifically, it is with respect to
12 those documents, but we think the documents, as well as the
13 fee issues that Mr. Gentile raised and that Mr. Schneider
14 raised, suggests that there isn't evidence, that the
15 Government is putting its thumb on the scales here, Your
16 Honor. And if that is true, if the Government is proactively
17 taking steps to interfere with Mr. Gentile's ability to
18 prepare his defense, whether it be specifically to the
19 documents that he has requested and sought as part of his
20 defense, or more generally with respect to his choice of
21 counsel and steps to prepare his defense, we think that that
22 interference gives rise to a potential motion to dismiss, or
23 other remedy.

24 And we submit that, at this juncture, as to
25 Mr. Gentile, it's premature to address that. Instead we

1 should be provided with the relevant materials that we seek,
2 and the information that we seek, and then evaluate what the
3 appropriate remedy is there. But there can be no doubt, as
4 set forth by *Stein*, by Judge Kaplan, and by the Second
5 Circuit, that interference in this regard by the U.S.
6 Government does raise constitutional issues that do have
7 consequences.

8 THE COURT: Okay. Thank you.

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1 THE COURT: Thank you. All right.

2 This next subject we can go into very, very quickly
3 because unless there's some additional law that folks wanted
4 to tell me on the CVRA issue, I don't know there's much to
5 discuss there, but, you know, the defendant argues that
6 defendants -- the two defendants argue that the CVRA might be
7 unconstitutional in certain respects.

8 Is there any legal authority you can point me to
9 other than what you've -- anything you've put in your motion
10 papers?

11 MS. ZELL: Your Honor, the defense does not take the
12 position that the government must rule -- or that the Court
13 must rule on the constitutionality of the CVRA, rather that
14 the CVRA should be construed in a constitutional manner which
15 requires referring to alleged victims as what they are,
16 alleged or potential victims. Your Honor requested any
17 additional case law and I would just like to bring two points
18 to the Court's attention.

19 First, in the case cited by the government, *United*
20 *States v. Silver* at 378, there the Court did not accept one of
21 the arguments being offered by the government in this case.
22 Specifically, the suggestion that, quote, any prejudicial
23 effect or otherwise improper comments are magically dispelled
24 by sprinkling the word "alleged" or "allegations" liberally
25 throughout the press conference or speech, or by inserting a

1 disclaimer that the accused is innocent unless and until
2 proven guilty at the end of an otherwise improper press
3 release. This reasoning and logic is equally applicable here.

4 I would also like to draw the Court's attention to
5 local criminal Rule 23.1(d)(7), albeit in the context of free
6 press, this is a presumption that this court has already made
7 that statements concerning specific subject matters carry with
8 them a substantial likelihood that their public dissemination
9 will interfere with a fair trial or otherwise prejudice the
10 due administration of justice. At number seven within that
11 rule is any opinion as to the accused guilt, the accused guilt
12 or innocence which the government has done repeatedly
13 throughout this notice.

14 THE COURT: Tell me specifically what statements
15 you're relying on for that last statement you've made.

16 MS. ZELL: The government refers to uncharged
17 crimes, specifically it refers to uncharged crimes of which
18 you are a victim and thereby implies that there are uncharged
19 crimes that the defendants have committed.

20 THE COURT: But -- okay, is it tied to specific
21 defendants these notices?

22 MS. ZELL: Yes. So the notice that was sent out in
23 December of 2021, one of the first paragraphs is the case
24 number, the defendants, it's in bold with all of the
25 allegations so it's very clear what -- who is being referenced

1 in this case. And the notice also has an FAQ section where
2 there are a bullet point questions and answers and all of
3 those questions are repleted with references to victims.

4 THE COURT: Thank you.

5 Does the government want to respond -- I'm sorry,
6 were you finished?

7 MS. ZELL: Oh, and I'll also point out that the
8 notice also makes a lot of statements regarding loss and
9 restitution and presumes that a loss has been -- has occurred
10 which may not never happen in this case and directly tells the
11 recipients of this letter that at the conclusion of the
12 criminal case they can apply for restitution.

13 THE COURT: So what meaningful information do you
14 think that victims or alleged victims should get it in and
15 what form when you have a case like this?

16 MS. ZELL: So the Criminal Victims Restitution Act,
17 we'll call it the CVRA, requires that the government provide
18 notice of four items:

19 First, that the government provide reasonable,
20 timely and accurate notice of status conferences;

21 Timely notice of plea agreements and deferred
22 prosecution agreements;

23 Three, notice of alleged victims' rights which, pre
24 the conclusion of a criminal case, are limited;

25 And four, contact information for Department of

1 Justice.

2 The government can comply with its limited pretrial
3 notice obligations while still respecting and observing the
4 presumption of innocence and the defendants' right to a fair
5 trial.

6 THE COURT: But how much, in your view, can the
7 government say about the alleged conduct or the alleged crime?

8 MS. ZELL: The government can say whatever is
9 allowed by the local rules which I think is merely stating
10 what is alleged or what the defendants are alleged to have
11 committed.

12 Here, the government went far beyond its limited
13 notice requirements by inserting a statement regarding
14 uncharged crimes and adding an entirely new section, the FAQ
15 section, in which it makes statements regarding the value of
16 GPB funds, which are belied by the exhibits we included, makes
17 statements regarding loss, which may never occur in this case,
18 and statements regarding restitution.

19 THE COURT: Thank you.

20 Does the government wish to respond?

21 MS. ELBERT: I don't think I have anything to add
22 beyond what was submitted. Thank you, your Honor.

23 THE COURT: Thank you. I think we're up to the
24 final motion which is the motion -- the joint motion for
25 discovery and defendants are seeking an order directing the

1 government to produce certain materials pursuant to Rule 16
2 and requesting that the Court order certain subpoenas pursuant
3 to Rule 17(c).

4 I note that certain of the defendants' other
5 motions, which of course we talked about now, seek discovery
6 in connection with defendants' claims, so in this motion
7 defendants seem to specifically be seeking materials related
8 to the Court's June 14th, 2022 order, and they claim that the
9 requested discovery will, quote, bolster a claim of improper
10 government conduct in obtaining that order that deprived
11 Mr. Schneider and Mr. Gentile of their rights to due process.

12 So how does the relief sought by way of this motion,
13 this joint motion for discovery, intersect with the relief
14 sought by way of defendants' other motions, or put
15 differently, is the goal of this particular motion to obtain
16 further evidence in support of defendants' motion to dismiss,
17 or is this discovery being sought for a different or an
18 additional reason?

19 MR. COLTON: The answer to the question, your Honor,
20 is in just the evidence that we have so far on the way in
21 which the government litigated and convinced the Court to
22 order the 502(d) order, what we have so far doesn't support a
23 motion to dismiss, which is why it's only styled in its four
24 corners as a discovery motion. But we do make the point in
25 the motion to dismiss that the misrepresentations or material

1 omissions made to the government -- made by the government to
2 the Court in getting the 502(d) order and the other behavior
3 that we know about in getting the 502(d) order, is one of a
4 variety of factors that should come into play in evaluating
5 whether dismissal is the appropriate remedy, as we assert.

6 So, to directly answer another portion of your
7 Honor's question, some of the discovery requested in just the
8 entitled discovery motion does dovetail with the fall-back
9 requests in some of the other motions in the event of an
10 evidentiary hearing.

11 THE COURT: That's helpful.

12 Mr. Gentile's counsel, do you want to respond?

13 MR. BUCKLEY: No, your Honor, we agree with what
14 Mr. Colton just said.

15 THE COURT: Okay. Does the government have any
16 comment on sort of the overlapping -- somewhat overlapping
17 nature of some of these motions?

18 MS. ELBERT: No, your Honor.

19 THE COURT: Thank you.

20 At some point in the brief, I think it's ECF 187,
21 defendants accuse the government of a lack of candor to the
22 Court. What's specifically are you alleging there? Because
23 that's quite an accusation.

24 MR. COLTON: It is, and it was not made lightly.

25 The way in which the entire litigation over the access to

1 privileged materials was done, as the Court will recall this,
2 none of the parties here had access to those materials, not
3 the Court, not defense counsel, not the prosecution team. So
4 we were all operating a little bit in the unknown as to
5 precisely what was there. Once the Court granted the order
6 and materials were provided to the defense, we found out
7 certain things we didn't know before. We ran a very -- we
8 believe and still believe and believe we can prove there's a
9 common interest in a joint representation, which we made those
10 representations with affidavits before the Court issued its
11 order.

12 So what we did is we ran a very simple search,
13 common interests and Schneider through the materials we did
14 not have before and it turned up material -- I want to be
15 careful what I say, because of some of it has been filed under
16 seal and some of it is still -- some potentially subject to
17 privilege, but that made clear that the government knew of the
18 joint representation by Herrick of Ascendant Capital and GPB
19 Capital. The government was told expressly and explicitly of
20 that joint representation on this very investigation, which
21 means the government knew that the claim by Mr. Schneider of a
22 joint representation privilege, if nothing else, was not
23 spurious, was not specious, was not unsupported, but frankly
24 it was something they were told back in 2018 and they should
25 have told your Honor about it. Maybe they could have

1 explained it away, maybe they could have made the arguments
2 they make today about why it's not so meaningful, but they
3 should have never hidden that fact from the Court while
4 standing in the well calling our claims spurious.

5 THE COURT: Does the government wish to respond?

6 MS. ELBERT: I think the only thing that I would say
7 in response, your Honor, is that I don't think that the 2018
8 email goes as far as Mr. Colton suggests it does. The fact
9 that at some point in 2018 an associate at the law firm
10 referred to Ascendant as our client, does not establish that
11 there was a common interest privilege for any period of time
12 over any specific material that encompassed Mr. Gentile and
13 Mr. Schneider in their individual capacity. Subsequent to
14 that, to our knowledge, Ascendant was always represented by
15 other counsel. This was, frankly, before my time on the case
16 so I didn't know that this period existed, so I think to
17 allege based on that that we were intentionally misleading the
18 Court really overstates the issue and, frankly, is part of a
19 pattern of the defendants' efforts to turn this case into
20 Gentile and Schneider versus the prosecution team as opposed
21 to a criminal case. And, as we said in our papers, this is
22 just a continued effort to waste time on ancillary issues and
23 we think we should really be getting to preparing for trial.

24 THE COURT: Okay. So let me -- we've covered
25 everything that I wanted to ask about, I think we've covered

1 even well more than that, I think the parties have been
2 covered. I'll give you, you know, one minute -- one to two
3 minutes each if there's something crucial you think has not
4 been covered either in your papers or today that you want to
5 leave me with, and then we'll talk about next steps.

6 So let me start with counsel for Mr. Gentile, is
7 there anything you would like to raise?

8 MR. MENCHEL: Yes, briefly, your Honor. Regarding
9 the motion to suppress the search warrant, I just wanted to
10 make a couple of points.

11 Counsel said that there's no prejudice because of
12 the time from the indictment to when the warrant return was
13 finalized, there's no case law that supports that the Fourth
14 Amendment gets tolled during the period of time in which the
15 investigation is undergoing, but there is no indictment.
16 That's just not simply the law. It's either unreasonable
17 delay or it's not unreasonable delay. The time from the
18 indictment to production is not the controlling point.

19 I saw in our papers but I don't think it was
20 highlighted well enough, that in addition to the catchall
21 statutes that we claim make this warrant not particularized,
22 there is also a specific reference to Title XXVI violations,
23 tax violations, which I think really puts it over the edge
24 because we're going beyond just fraud statutes now into tax
25 statutes, which would have made this a completely

1 non-particularized warrant.

2 The last point I want to make on this, your Honor,
3 is in terms of probable cause, when you remove the GPB Capital
4 Holdings Company, the one that Mr. Gentile owns, from the
5 affidavit, because it could not have victimized anybody, there
6 were no investors in that company, as I explain, the probable
7 cause, if taken as true, only relates to three entities:
8 Holdings, or which was referred to as Holdings I; Automotive
9 Portfolio, which was referred as to Automotive; and Holdings
10 II, but the actual warrant itself allows for an unfettered
11 search of every single fund listed in the warrant plus those
12 that aren't by virtue of anything that's in relation to or in
13 connection to as well. So we think that's another reason for
14 why this warrant is so non-particularized as to basically
15 constitute a general warrant.

16 And I'll turn it over to my counsel for the other
17 issues.

18 MS. RIVIERE-BADELL: Just one point, your Honor,
19 because Ms. Elbert referenced the practice, and I want to just
20 refer back to Judge Cronan's decision that cited to Judge
21 Furman's decision in *Rhodes*, and it served that, quote, the
22 prevailing practice within this Circuit, that is the Second
23 Circuit, is to resolve questions of joint investigation team
24 or requests for additional discovery to support motions
25 alleging due process violations after reviewing affidavits.

1 So we think that's very clear, your Honor, that it
2 does require the government to submit affidavits in response.

3 THE COURT: Mr. Colton.

4 MR. COLTON: Yes, your Honor, I'll do it briefly as
5 requested and also one point Ms. Vora would like to bring up
6 on a point that she argued after I go.

7 Your Honor, with respect to the search warrants, I
8 think -- and I don't think the Court would do this but I just
9 want to make sure we're clear, that the affidavits are very
10 different. The affidavit that went in for the GPB warrant --

11 THE COURT: I'm fully aware of that, yes. Thank
12 you.

13 MR. COLTON: The warrant and the affidavits for
14 Mr. -- Jeffryschneider@gmail --

15 THE COURT: Yes.

16 MR. COLTON: -- in essence calls for all
17 communications and internet activity of Jeffry Schneider,
18 which is precisely the general warrant ruled unconstitutional
19 and suppression ordered in *United States versus Wey*. This is
20 a general warrant in all forms, all communications by the
21 owner of the account. There -- that covers absolutely
22 everything. And the notion that these generalized statutes
23 somehow limit it, is not so at all.

24 Now with respect to the allegations, the government
25 made the comment in the oral argument about the GPB warrants

1 that there was a lot of other evidence presented. Not so in
2 the Google affidavit. When you correct the misstatements and
3 add back the omissions, you have a warrant, we think it's a
4 general warrant for everything, but even if you look at it for
5 GPB, zero information about the Holdings II fund, zero
6 information about the Waste fund, zero information about the
7 Cold Storage fund, zero information about the Realty fund. As
8 to Auto 2014, net income greater than distributions. As to
9 Auto 2015, net income greater than distributions. As to
10 Holdings II in '14 and '15 together, before it stopped
11 actually selling, net income greater than distributions.
12 There is practically nothing left when you actually put back
13 the accurate information into the warrant. Absolutely nothing
14 there, and when you add in the actual contents of the emails
15 that they edited and kept from the magistrate, you have
16 additional evidence of a hundred percent coverage in Holdings
17 II -- in Holdings I, excuse me.

18 By the way, a warrant for all GPB funds that
19 provides no information whatsoever as to about 70 percent or
20 so, or 60 percent of the funds raised, is improper practically
21 by definition. And the government cannot rely on good faith
22 here because even *Leon*, a 1984 Supreme Court case that
23 established a good faith exception says, that you can't
24 mislead the magistrate and rely on the good faith exception.
25 And the Second Circuit says you cannot hide exculpatory

1 information from the magistrate and rely on the good faith
2 exception.

3 Here, since the government hasn't even contested the
4 misrepresentation of the critical emails on which they rely,
5 we argue this may very well be the case where a *Franks* hearing
6 isn't even necessary and suppression is required, but we
7 believe we have far beyond met the substantial preliminary
8 showing necessary for a *Franks* hearing.

9 And with that I'll defer to my colleague, Ms. Vora.

10 THE COURT: Go ahead, Ms. Vora.

11 MS. VORA: Thank you. I just want to make one quick
12 point which is to highlight that the Court does not need to
13 find improper coordination in order to find that the
14 government violated the Fifth Amendment as interpreted by
15 *Garrity* and its progeny. This case, the factual record that
16 we've set forth in our motion, is squarely within *Garrity* and
17 its progeny, and suppression of the NJBOS and SEC testimony
18 and statements and any fruits of the poisonous tree would thus
19 be required. Now, the improper coordination that we've
20 brought -- that we've highlighted exacerbates the harm, that
21 that just makes the need for suppression even stronger. Thank
22 you.

23 THE COURT: Thank you.

24 Does the government wish to raise anything?

25 MS. ELBERT: I don't think so, your Honor.

1 THE COURT: Okay. So one or two small matters to
2 take up, but to close the loop for now on the motions, I'm
3 going to set some deadlines. So any supplemental submissions
4 as discussed on the record today should be filed by
5 December 16th, and if anything is sought to be filed under
6 seal there must be an appropriate sealing motion and an
7 appropriate showing. Any response to such supplemental
8 submissions should be filed by December 22nd. And that's what
9 we discussed, you all know what submissions we're talking
10 about here.

11 So I'm going to set the next conference down for
12 February 13th, 2023 at 10:30 in the morning. However, I will
13 tell the parties that if the Court feels like we should be
14 coming back sooner than that, the Court will advise the
15 parties of that. But for now I think it's important that we
16 have a firm date.

17 Ms. Elbert, if this case goes to trial, what is your
18 trial length estimate?

19 MS. ELBERT: We estimate three to four weeks
20 depending on the length of any defense case. I think the
21 government presentation will likely come in at around three
22 weeks.

23 THE COURT: Thank you. Is there anything else you
24 want to raise with me about the status of the case?

25 Obviously, there's significant motions pending, but is there

1 something else you want to raise I'll hear you now?

2 MS. ELBERT: Yes, your Honor, we think it would be
3 beneficial for the management of this case if we did try to
4 set a trial even if it were to be sometime far into the
5 future. This case has been pending for quite sometime. We've
6 already had extensive pretrial litigations and we feel that
7 setting a trial date will help sort of get the parties to
8 focus on issues relevant to trial and start preparing for
9 trial and help this case proceed in a more efficient way.

10 THE COURT: Let me hear the defense counsel on
11 anything they'd like to raise about status or next steps and
12 then we can adjourn.

13 MR. COLTON: A couple of things, your Honor. And I
14 don't expect the Court to rule in any way on what I'm saying,
15 I'm just informing the Court of developments.

16 We are -- we've informed the government about this.
17 We encountered substantial technical difficulties with the
18 productions. I'm not exactly the right person to explain
19 technology to anyone, but as I understand it, a lot of native
20 files are missing, other critical metadata is missing which
21 inhibits an ability to actually have a defense get through the
22 material and prepare for trial. It's again something that
23 we've written to the government about, the government wrote
24 back last night. Candidly, I've been preparing for this
25 argument, I have not been able to fully digest that, but

1 that's an issue that really effects the ability to go forward,
2 what schedule to go forward, which is really obviously
3 important to be able to review the materials.

4 There are some other discovery requests that are out
5 there that obviously need to be resolved. There is no motion
6 to that effect so I'm not -- I'm just telling your Honor
7 there's things we're still trying to work on, and as far as
8 setting a trial date, while no one is looking for delay, I
9 think it's difficult to predict what a reasonable trial date
10 would be without understanding -- and of course I'm not asking
11 at this point -- what the Court eventually determines on how
12 these motions are resolved, whether hearings or further
13 submissions will be required. I've certainly found myself in
14 other cases where hearings or other motion issues have played
15 a substantial role in what the proper schedule for a trial is
16 and sometimes it's actually more difficult to set it and keep
17 moving a trial date, and so I would ask that the Court not set
18 that date until we come back again together and I imagine the
19 Court will at least have greater understanding of, you know,
20 the way in which this case is likely to proceed based on the
21 rulings that would be forthcoming or possibly forthcoming.

22 THE COURT: Okay. Let me hear from Mr. Gentile's
23 counsel.

24 MR. MENCHEL: We conferred before, we agree with
25 that.

1 THE COURT: It's helpful for me to know the
2 government's trial estimate and the government's position and
3 defense position on trial. I'm certainly not, as I sit here
4 now, prepared to set a trial date. While I really do hope
5 that the Eastern District system of setting trials changes to
6 allow more flexibility to individual judges soon, we are not
7 there yet, so we are still operating under a centralized
8 system for scheduling trials, but -- so I'm not going to set a
9 trial date today. But I am mindful of the fact that there's
10 benefit in moving things along and certainly I think everybody
11 benefits from at some point reaching finality on cases
12 certainly.

13 So I am going to set, again, the next conference for
14 February 13th at 10:30 in the morning. And again, if the
15 Court feels the need to bring the parties back in before that
16 I will certainly do that.

17 Is there an application for the exclusion of time
18 for Speedy Trial Act purposes, the time from today until
19 February 13th, 2023.

20 MS. ELBERT: Yes, your Honor, given the pending
21 motions time is tolled under the Speedy Trial clock, however,
22 in the event your Honor decides the motions between now and
23 February, we would submit that exclusion is appropriate
24 between today's date and the February conference date in order
25 to allow the parties to continue to review discovery, to

1 resolve some of the outstanding discovery issues, and to
2 prepare for trial.

3 THE COURT: Let me ask the defense counsel whether
4 they join in the application for the exclusion of time.
5 Counsel for Mr. Gentile?

6 MR. MENCHEL: Yes, your Honor.

7 THE COURT: Counsel for Mr. Schneider?

8 MR. COLTON: No objection, your Honor.

9 THE COURT: Counsel for Mr. Lash?

10 MR. GOTTLIEB: No objection, your Honor. Thank you.

11 THE COURT: I will exclude time for Speedy Trial Act
12 purposes. I do so under Title 18, United States Code,
13 Section 3161(h)(7)(A). I find that the ends of justice served
14 by excluding the time from today until February 13, 2023
15 outweigh the best interests of the public and the defendants a
16 Speedy Trial for several reasons, including that there appears
17 to be some discovery issues that need to be resolved in terms
18 of being able to review the discovery, as Mr. Colton
19 mentioned, and there are of course the pending motions that I
20 am going to be awaiting those supplemental submissions from
21 the parties with respect to the motion practice, and I believe
22 for those reasons that the exclusion of time is appropriate,
23 the time from today until February 13th, so I do exclude it.
24 Give me one moment please.

25 With that we will adjourn. I wish everyone a safe

1 end of the year and be well all. Thank you for arguments
2 today. I found them very helpful and I particularly was
3 pleased to see that there were some new people arguing the
4 Court today, although I'm always happy to hear from the folks
5 that have been arguing this case as well but the arguments
6 were very helpful to the Court. Thank you all. We're
7 adjourned.

8 (Matter concluded.)
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