

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

21 CR 54 (RPK)

DAVID GENTILE, et al.

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT JEFFRY SCHNEIDER'S
RENEWED MOTION TO SUPPRESS

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PRELIMINARY STATEMENT

The government respectfully submits this memorandum in opposition to defendant Jeffrey Schneider's renewed motion to suppress the fruits of a search warrant executed upon a Gmail email address controlled by Schneider. ECF Dkt. No. 261 (the "motion" or "mot."). The government respectfully submits that the defendant's motion, like his prior motion to suppress, ECF Dkt. No. 145, should be denied in full.

RELEVANT BACKGROUND

On or about June 26, 2020, the Government applied for a search warrant to obtain certain materials associated with Google email account jeffryschneider@gmail.com (the "Google Warrant"). The Honorable Cheryl L. Pollak, Chief Magistrate Judge for the Eastern District of New York, authorized the Google Warrant, which is attached hereto as Exhibit A.

On or about June 26, 2020, the Google Warrant was served upon Google Inc. Subsequently, in August 2020, Google Inc. provided the government with the contents of the Google email account jeffryschneider@gmail.com (the "Target Account") for the period from January 1, 2014, to June 26, 2020. Prior to any member of the prosecution team reviewing these materials for evidence responsive to the Google Warrant, the government provided the materials to a vendor, which applied privilege and subject matters search terms in order to isolate a pool of documents that were likely responsive and also not privileged. This included the use of word search techniques, such as the names, emails and other identifiers of known in-house or outside attorneys that were retained or consulted by individuals and entities associated with GPB as well as any known attorneys who represented Schneider, as well as Boolean operators. Any items that "hit" on the privilege search terms were removed and have not been available to any member of the prosecution team. Notably, Schneider used his personal Google email address consistently for purposes related to his work at GPB; as the Google Warrant reflects, he directed parties to

contact him via his personal email address in order to avoid FINRA oversight. Ex. A at ¶ 18 (quoting November 1, 2014 email in which Schneider directs co-defendants Gentile and Lash to email him at his gmail account to avoid FINRA review).

Following application of the privilege and subject matter search terms, a narrowed set of materials (the “first cut materials”) was made available to the government in September 2020, after which a review continued through the use of a vendor supplied document-review database (the “prosecution team database”). The first cut materials, which were screened for both potential privilege and responsiveness through the use of search terms, as described above, were provided to the United States Securities & Exchange Commission (the “SEC”), upon its request, in or around September 2020. The government produced the first cut materials to Defendant Schneider on or about April 16, 2021, less than three months after the indictment and arrest.¹

In an effort to avoid unnecessary litigation over the responsiveness of materials that the government was not ultimately going to introduce at trial, the government further narrowed the first cut materials to a collection of 390 documents, which the government identified to Schneider as responsive to the Google Warrant and which constituted potential trial evidence and exhibits. The government provided Defendant Schneider with a list identifying these 390 documents on August 27, 2021. Upon consultation with Schneider, this list was reduced to 379. The government produced these 379 documents to all defendants in Rule 16 discovery on March 25, 2022. The government also removed the remainder of the first cut materials, other than the 379, from the prosecution team database.

¹ A grand jury sitting in the Eastern District of New York issued an indictment on January 29, 2021.

As requested by the defendants, in furtherance of its discovery obligations, the government collected from the SEC all materials it had gathered in connection with its parallel investigation, and produced those materials to the defense initially on May 6, 2021. Upon discovery of a Bates numbering error, the government then re-collected and reproduced the entire SEC production on November 4, 2021 (the “SEC Production”). The government did not upload the SEC Production into the prosecution team database because, prior to its collection of the SEC Production for discovery purposes, the government had already received voluminous investigative materials from the SEC (not including the first cut materials) that were uploaded into the prosecution team database, and it believed the SEC Production to essentially duplicate those materials.² The government did not realize the SEC had included the first cut materials in the SEC Production until so informed by counsel to Schneider in or around October 2023.

In or around October 2023, counsel identified to the government certain documents included in the SEC Production, deriving from the Google warrant, as to which Schneider asserted privilege. The government issued claw back notifications to the SEC and to Schneider’s co-defendants relating to those materials. The government has not sought to claw back non-privileged materials from the first cut materials, which have been in the recipients’ possession for at least approximately two years.

ARGUMENT

The government has acted in good faith at all times in connection with its execution of the Google Warrant. It has no intention of introducing any materials from the Google Warrant beyond the 379 documents already identified to the defense, nor has it continued to search or

² The government has since uploaded to its database the SEC Production, though it excluded from the uploaded production the Google Warrant return. The 379 disclosed, responsive documents remain accessible to the government.

review the first cut materials since identifying those documents. Its production of the first cut materials to the SEC was lawful, and while the government did not intend to produce all of those materials to Schneider's co-defendants, the production was not made in bad faith. The government's execution of the Google Warrant was reasonable, and there is no basis for suppression. Nor is there any basis to relitigate Schneider's prior motion to suppress, which was denied by Judge Gujarati following extensive briefing and argument.

I. Applicable Law

"The general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant." United States v. Ramirez, 523 U.S. 65, 71 (1998).

"Where the executing agents exceed the warrant's authority in the search of their scope, the normal remedy is suppression and return of those items, not invalidation of the entire search." United States v. Pinto-Thomaz, 352 F. Supp. 3d 287, 308-09 (S.D.N.Y. 2018) (citing United States v. Matias, 836 F.2d 744, 747 (2d Cir. 1988)). "The drastic remedy of the suppression of all evidence seized is not justified unless those executing the warrant acted in flagrant disregard of the warrant's terms." Id. "Executing agents are considered to have 'flagrantly disregarded' the warrant's terms where (1) they effect a widespread seizure of items that were not within the scope of the warrant and (2) do not act in good faith." Id. (citing United States v. Shi Yan Liu, 239 F.3d 138, 140 (2d Cir. 2000)).

"[C]ontinued retention of a complete copy of all seized documents until trial concludes is normal." United States v. Aguilar, No. 20-CR-390 (ENV) (E.D.N.Y.), ECF Dkt. No. 160 (attached hereto as Exhibit B) at 7 (rejecting challenge to government's retention of material affirmatively identified as non-responsive). "Even if the government's retention of . . . both responsive and non-responsive data was unreasonable, blanket suppression . . . would not be

appropriate and is not supported by the law.” Id. at 8 (citing United States v. Mendlowitz, No. 17-CR-248 (VSB), 2019 WL 1017533, at *12 (S.D.N.Y. Mar. 2, 2019)).

II. Argument

The only fruits of the Google Warrant that the government intends to offer at trial are the 379 documents as to which there is no dispute about their responsiveness. The fact that additional non-privileged materials were provided to Schneider’s co-defendants as part of the SEC Production does not taint the Google Warrant or the government’s execution of that warrant such that wholesale suppression, including of the 379 documents, would be appropriate.

Schneider’s motion is replete with allegations of the government’s bad faith, but those allegations are as baseless as they are illogical. The allegation, as the government understands it, is that the government designated 390 documents as responsive to the warrant and pulled the remainder out of its database, but then intentionally produced other materials to his co-defendants for the sole purpose of “trampl[ing] on Schneider’s Fourth Amendment rights,” despite the fact that the government never intended to offer those materials at trial. Mot. at 3. The government has obtained no benefit, strategic, investigative, or otherwise from the fact that the SEC Production included the first cut materials. Schneider has not, and cannot, present any evidence in support of his outlandish claim that the government produced those materials solely to trample on Schneider’s rights.

To the extent Schneider’s motion seeks return of certain sensitive personal material, the government has offered to ask his co-defendants and the SEC to return or destroy that material; this offer was rejected by Schneider. His rejection of that offer reveals this motion for what it is – a cynical effort at obtaining an advantage in the litigation by baselessly accusing the government of intentional misconduct. Schneider further attacks the government for failing to issue claw back notices of non-privileged materials that it produced; he cites no case for the proposition that the

government is under any obligation to do so. Moreover, Schneider himself was on notice of the production of these materials for approximately two years prior to alerting the government, and so any argument regarding overproduction or his entitlement to have non-privileged materials clawed back should be deemed to have been waived.

This case is readily distinguishable from United States v. Metter, 860 F. Supp. 2d 205 (E.D.N.Y. 2012), which did not involve inadvertent production, but instead involved a failure by the government to review seized digital materials for responsiveness or privilege whatsoever, followed by production of wholesale digital search warrant returns to all defendants. 860 F. Supp. 2d at 215 (emphasizing that digital materials in that case were retained and produced “without any review whatsoever”). In this case, as described above, the first cut materials were screened for privilege and responsiveness through the use of electronic search terms before they were produced to anyone. And, the government only intends to use materials at trial that the parties agree are within the scope of the warrant.

As to Schneider’s attempt to resurrect his prior suppression motion from the dead, that effort should also be rejected. Judge Gujarati’s thorough, well-reasoned decision denying the motion should stand. Tr. of Conf. dated Feb. 13, 2023 (attached hereto as Exhibit C) at 37-45. As Judge Gujarati found, Schneider failed to meet his burden of establishing his entitlement to a hearing. Tr. at 44. The warrant was not overbroad or insufficiently particular, id. at 41-42, and the responsiveness review was completed in a reasonable period of time. Id. at 43-44. As Judge Gujarati noted, throughout this case, the defendants have “repeatedly impugn[ed] the government for acting improperly or in bad faith in some way . . . [but] the record is notably bereft of any

showing that raises a genuine question as to the propriety of the government's conduct." Id. at 50. The government maintains that it acted in good faith in connection with the Google Warrant.

CONCLUSION

For the reasons set forth above, the government respectfully submits that Schneider's renewed motion to suppress should be denied.

Dated: Brooklyn, New York
February 27, 2024

Respectfully submitted,

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Cc: Clerk of the Court (RPK)
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