UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v. -

KEITH RANIERE, CLARE BRONFMAN, ALLISON MACK, KATHY RUSSELL, LAUREN SALZMAN, and NANCY SALZMAN,

Defendants.

No. 18 Crim. 204 (NGG)

Date of service: January 9, 2019

MEMORANDUM IN SUPPORT OF KATHY RUSSELL'S MOTION TO DISMISS THE INDICTMENT OR, IN THE ALTERNATIVE, TO COMPEL DISCOVERY

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PRELIMINARY STATEMENT

Individuals compelled to testify before a grand jury are entitled to "conscientious and dutiful conduct by the prosecutor, who is an administrator of justice, an advocate, and an officer of the court." *United States v. Gillespie*, 974 F.2d 796, 801–02 (7th Cir. 1992), *as amended on denial of reh'g* (Sept. 28, 1992). As to Kathy Russell, the prosecutors in this case failed to fulfill that mandate. Instead, on May 10, 2018, the government called Ms. Russell to testify before the same grand jury that, a mere ten weeks later, it asked to return an indictment against her. She did so because the government led her to believe, wrongly, that she was nothing more than a fact witness. Ms. Russell never received a "target" or "subject" letter – to the contrary, at the outset of her testimony, the prosecutor explicitly assured her that she was *not* a target. The prosecutors' conduct and statements were misleading. Based on the government's questioning in the grand jury, Ms. Russell was certainly not a "witness" at the time of her testimony. She was asked questions about a range of incriminating and sensitive topics, including the very conduct that formed the basis of the predicate acts with which she was subsequently charged. At bare minimum, she was a "subject" and likely a "putative defendant" or target.

This Court retains supervisory power to dismiss an indictment where misconduct before the grand jury "substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988). Here, there is such grave doubt. The prosecutors' conduct toward Ms. Russell, including explicit misleading statements, was fundamentally unfair and induced Ms. Russell to partially waive her Fifth Amendment rights and provide incriminating testimony to the grand jury that ultimately indicted her. Accordingly, this

Court should exercise its supervisory power and dismiss the Indictment, or, in the alternative, compel the production of discovery and conduct an evidentiary hearing.[1]

FACTUAL BACKGROUND

On or about April 25, 2018, six days after the government indicted Keith Raniere and Allison Mack, Kathy Russell received a subpoena, summoning her to testify before the grand jury on May 10, 2018. *See* January 7, 2018 Declaration of Justine Harris (hereinafter "Harris Decl."), Ex. A. The subpoena had been slipped under her apartment door, without any attachments or a cover letter. Specifically, there was no letter advising her that she was a target of the investigation, nor, in contrast to subpoenas received by other individuals, was there a letter advising her that she was a "subject" and containing an "Advice of Rights."

Shortly thereafter, Ms. Russell retained William Fanciullo, Esq. Mr. Fanciullo contacted the prosecutor on April 30, 2018 to advise her of the representation. Harris Decl., Ex. B. Other than email communication between the prosecutor and Mr. Fanciullo to confirm the date and time of Ms. Russell's appearance, the two did not communicate about Ms. Russell's status in the investigation in advance of the grand jury date. *Id.*, ¶ 7.

On May 10, 2018, the original return date for the subpoena, Ms. Russell, accompanied by her counsel, appeared in the Eastern District of New York in response to the subpoena. At the outset of the examination, which commenced at 2:33 p.m., the prosecutor affirmatively advised Ms. Russell that she was *not* a target, as that term is defined by the United States Department of Justice's U.S. Attorney's Manual. She stated:

[redacted]

[1] The government has represented that it will not seek to introduce Ms. Russell's statements in its case-in-chief. To the extent it seeks admission of her grand jury testimony for some other purpose, we reserve our right to object, or move to suppress for the reasons stated herein.

[redacted]

Harris Decl., Ex. C at 5:16-21. Then, after advising Ms. Russell about the nature of the proceedings, her obligations to tell the truth, and her right to counsel, the prosecutor went on to make a series of statements conveying the government's view of the scope of Ms. Russell's Fifth Amendment rights:

[redacted]

Id. at 8:5-11, 9:12-16, 9:18-20 (emphasis added).

Following the prosecutor's assurances, as well as her "advice" concerning the Fifth Amendment, Ms. Russell testified for nearly two hours. She answered the prosecutor's questions on a range of topics, including: her experiences with NXIVM, including the courses she took, and her positions as proctor, coach, and bookkeeper; the general nature and philosophy of NXIVM and related entities, including JNESS, SOP, and SOP Complete; and certain NXIM rules, rituals, and ranking systems. The prosecutor actively encouraged Ms. Russell to share her opinions, stating in front of the grand jury: [redacted] *Id.* at 18:2-3.

The prosecutor also engaged Ms. Russell in an extended conversation about whether she had ever asked Keith Raniere about allegations that he had sexually abused minors or raped [redacted]. *Id.* at 36-43. During her colloquy with Ms. Russell, the prosecutor went so far as to comment on the government's court filings and efforts to collect evidence. After asking whether Ms. Russell had read the government's letter [redacted] in which the prosecutor had [redacted] *id.* at 41:10-13, and Ms. Russell responded that she didn't [redacted] *id.* at 41:15-16 the prosecutor stated:

[redacted]

Id. at 41:18-42:6 (emphasis added).

While answering many questions, Ms. Russell also asserted her Fifth Amendment right not to incriminate herself in response to other questions, including, *inter alia,* questions regarding (1) bookkeeping and taxes, *id.* at 32:10-13, 63:21-22; (2) individuals of interest in the investigation, *see, e.g.*, *id.* at 59:23-24, 62:1-4; and (3) DOS, *see, e.g.*, *id.*at 51:4-5, 55:10-11.

Two and half months later, on July 23, 2018, the government indicted Ms. Russell. She was arrested the following day. The Superseding Indictment (the "Indictment") charges Ms. Russell in Count One, the alleged RICO conspiracy, and names her in Predicate Acts One and Two relating to identity theft. Harris Decl., Ex. D ¶¶ 17-20. In their July 24, 2018 letter concerning bail, the government explains that Act One, alleging conspiracy to commit identity

theft for the purposes of evading immigration laws arises "out of a scheme by co-conspirators to smuggle an alien into the United States through Canada after the alien was denied legitimate entry into the United States." Harris Decl., Ex. E at 3. Specifically, the government alleges that "Russell drove from Albany, New York to Toronto, Canada where she met the alien and provided her with an identification card bearing the last name and birthdate of a woman who had recently died." *Id.* As to Predicate Act Two, the government's bail letter describes this act as "part of the scheme to obtain usernames and passwords of people believed to be Nxivm's enemies so their emails could be monitored by the Enterprise." *Id.*

Yet it is clear at the time of the grand jury proceeding, when the prosecutor advised Ms. Russell that she was *not* a target, that the government already had information about the allegations it ultimately made against her in the Indictment. During the examination, the prosecutor asked Ms. Russell a series of questions clearly related to both the alleged border crossing in 2004 and email hacking. Specifically, the prosecutor asked when she was [redacted] Harris Decl., Ex. C at 34:2, and if she [redacted] *id.* at 58:4. As to the computer hacking, the prosecutor also asked Ms. Russell if she was [redacted] or [redacted] *Id.* at 59:15-16, 18-19.

On November 5, 2018, the government provided counsel with a transcript of Ms. Russell's grand jury testimony. Harris Decl. ¶ 11. By email dated November 14, 2018, the prosecutor said the government would not seek to introduce Ms. Russell's statements in its "case-in-chief." *Id.*, Ex. F. On January 4, 2019, counsel requested that the government produce "all documents relating to or reflecting when the government considered Ms. Russell a 'target,'" as well as "any instructions given the grand jury with respect to [Ms. Russell's] assertion of the

Fifth Amendment." *Id.*, Ex. G. On January 8, 2019, the prosecutor responded that although Ms. Russell was not a putative defendant at the time of her grand jury testimony, the government later "developed evidence making her chargeable with racketeering conspiracy." *Id.*, Ex. H. When asked whether she would be willing to share that evidence, the prosecutor replied that she was not. *Id.*

ARGUMENT

I. THE GOVERNMENT'S MISLEADING AND INACCURATE STATEMENTS TO MS. RUSSELL IN THE GRAND JURY WARRANT DISMISSAL OF THE INDICTMENT

A. This Court Retains Supervisory Power With Respect to Grand Jury Proceedings

While the government has broad discretion in conducting grand jury investigations, the prosecutor must nevertheless refrain from engaging in "fundamentally unfair tactics" before the grand jury. *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979); *see also Lassiter v. Dep't of Soc. Servs. of Durham Cty., N. C.*, 452 U.S. 18, 24 (1981) ("[D]ue process" incorporates "the requirement of 'fundamental fairness'"); *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("Under the Due Process Clause . . . criminal prosecutions must comport with prevailing notions of fundamental fairness."); *Quill v. Vacco*, 80 F.3d 716, 724 (2d Cir. 1996) (recognizing "the right to fairness in the criminal process" as a "fundamental" liberty interest subject to substantive due process analysis), *rev'd on other grounds*, 521 U.S. 793 (1997); *United States v. Gillespie*, 974 F.2d 796, 801–02 (7th Cir. 1992), *as amended on denial of reh'g* (Sept. 28, 1992) ("One protection to which a target [appearing before a grand jury] remains entitled is the conscientious and dutiful conduct by the prosecutor, who is an administrator of justice, an advocate, and an officer of the court" (internal quotation marks and citations omitted)).

To ensure that prosecutors fulfill their duty of fundamental fairness, a federal court, in the "exercise of its supervisory authority . . . 'may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.'" *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)). "The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct." *Hasting*, 461 U.S. at 505 (internal citations omitted). In fact, within this Court's supervisory authority is the power to dismiss an indictment when government misconduct before the grand jury "substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia*, 487 U.S. at 256 (internal quotation marks and citation omitted); *Carlson v. United States*, 837 F.3d 753, 762 (7th Cir. 2016) ("The inherent supervisory power of the court over the grand jury is well established.").

The terms "subject" and "target" are terms of art created by the Department of Justice to communicate specific information to attorneys and individuals during the course of a criminal investigation. According to the United States Department of Justice's U.S. Attorney's Manual ("DOJ Manual"), a "'subject' of an investigation is a person whose conduct is within the scope of the grand jury's investigation." DOJ Manual § 9-11.151. A "target" is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." *Id.* Importantly, whether an individual is a "putative defendant" is not subjective. As one Court of Appeals has explained, "the test as to whether a witness is a target of a grand jury investigation

cannot be whether he 'necessarily' *will be* indicted, but whether according to an objective standard he *could* be indicted." *United Stated v. Crocker*, 568 F.2d 1049, 1054 (3rd Cir. 1977) (emphasis added), *abrogated on other grounds* by *United States v. Gaudin*, 515 U.S. 506, 511-22 (1995); *see also United States v. Drake*, 310 F. Supp. 3d 607, 628–29 (M.D.N.C. 2018) (subjective intention of a prosecutor to seek an indictment cannot be determinative, because it "has a significant capacity to mislead as to the Government's knowledge and possible future consequences").

While there is no constitutional requirement that prosecutors warn an individual that he or she is a "target," *see United States v. Washington*, 431 U.S. 181, 189 (1977), evenhanded application of the DOJ policies is required to ensure that prosecutors treat targets in "a consistent manner," *United States v. Myers*, 123 F.3d 350, 358 (6th Cir. 1997), to avoid misunderstandings, *Drake*, 310 F. Supp. 3d. at 621 n.12, and to make sure that the government upholds its "commitment to fairness," *Gillespie*, 974 F.2d at 802. *See also United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established"). Although the DOJ Manual does not itself establish or confer any rights, it does set forth best practices for the treatment of witnesses and subjects: "the Department of Justice continues its longstanding policy to advise witnesses who are known 'targets' of the investigation that their conduct is being investigated for possible violation of Federal criminal law." DOJ Manual § 9-11.151. Accordingly, a grand jury subpoena to a "target" typically includes an "Advice of Rights" form, or a separate target letter warning the witness she is a "target." *Id.* The Advice of Rights form, a sample of which is included in Section 160 of Department of Justice's Criminal Resource Manual, also informs the witness of the scope of the grand jury investigation, the witness's Fifth Amendment right against

self-incrimination, and the witness's right to consult with counsel outside the grand jury room. *Id.* Advice of Rights forms are also served on "subjects" of the investigation. *Id.* "In addition, these 'warnings' should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them." *Id.*

There is of course no requirement – in the DOJ Manual or otherwise – that an individual be advised that he or she is *not* a target. Nevertheless, any "representation by an AUSA that an individual is neither a target nor a subject, but only a fact witness in that investigation, communicates information to several parties – counsel, individuals testifying before the Grand Jury, the Grand Jury, and this court – upon which those parties rely and act." *Drake*, 310 F. Supp. 3d at 621-22. Accordingly, courts have specifically warned of the danger of *erroneously* assuring a witness that she is *neither* a target or subject. *See United States v. Babb*, 807 F.2d 272, 278-9 (1st Cir. 1986) (such misrepresentation is "quite troublesome," "unprofessional and worthy of severe condemnation"); *Drake*, 310 F. Supp. 3d at 636 (such misrepresentation is "very concern[ing]").

The principal problem with such "misrepresentat[ion]" is that counsel is "prevented from intelligently rendering . . . advice" regarding whether the client should invoke her Fifth Amendment privilege, *see id.* at 625, and witnesses may be "lulled . . . into giving incriminating statement[s]," *Babb*, 807 F.2d at 279. The risk of lulling a witness is particularly heightened when the assurance is given to the witness in the grand jury proceeding itself, in light of the inevitable "coerciveness" that permeates "ex parte proceedings conducted in the absence of a lawyer" and led by a "a vigorous prosecutor." *United States v. Pacheco-Ortiz*, 889 F.2d 301, 308 (1st Cir. 1989) (internal quotation marks omitted). Testimony obtained in violation of the Fifth Amendment not only severely prejudices the witness, the government also obtains the

unfair benefit of the witness's testimony. *See Drake*, 310 F. Supp. 3d at 628; *see also Babb*, 807 F.2d at 279 ("[T]he obvious reason for . . . misrepresentations" regarding a grand jury witness's status is to "induce" the witness "to waive his fifth amendment privilege and give helpful testimony to the grand jury.").

B. The Government's Statements to Ms. Russell Violated Due Process and Lulled Ms. Russell into Waiving Her Fifth Amendment Rights

Here, the government's statements regarding Ms. Russell's status before the grand jury, as well as the erroneous legal advice concerning the scope of her Fifth Amendment rights, rendered the proceedings fundamentally unfair. First, unlike some of the other individuals who were served subpoenas in this matter, Ms. Russell did not receive an "Advice of Rights" form, let alone a subject or target letter. Further, at the outset of her testimony, Ms. Russell was expressly told that she was not a [redacted] meaning that the prosecutor did not have [redacted] Harris Decl., Ex. C at 5:17-19.[2] Moreover, the prosecutor erroneously and repeatedly told Ms. Russell that her Fifth Amendment rights were limited – that if she invoked the Fifth Amendment, it [redacted] and that if she was [redacted] *Id.* at 9:12-13, 18-19 (emphasis added).

These statements to Ms. Russell raise a variety of constitutional problems. The government's conduct, taken as a whole, left Ms. Russell and her counsel with the misimpression that she was only a "witness." Not only is it the Department of Justice's policy to append an "Advice of Rights" form to grand jury subpoenas served on both "targets" and "subjects," DOJ

[2] While the transcript reads [redacted] it is most certainly a typographical error and should read [redacted]

Manual 9-11.151, other witnesses in this case had in fact received subpoenas accompanied by "subject letters" containing an "Advice of Rights." *See* Harris Decl. ¶ 5. Accordingly, Ms. Russell and her attorney reasonably concluded that the absence of any such letter or notice meant that she was considered neither a subject nor a target. Indeed, the Second Circuit has suppressed grand jury statements when Strike Force prosecutors failed to provide target warnings, in contravention of the uniform practice of the United States Attorney's Offices in the Circuit. *United States v. Jacobs,* 547 F.2d 772, 778 (2d Cir. 1976). At bare minimum then, the government should be expected to engage in uniform practices with respect to different witnesses in the same case. *Cf. Crocker*, 568 F.2d at 1056 ("Certainly the uniform practice of warning target witnesses before grand juries in the Second Circuit has much to commend it, and we endorse that practice."); *See also United States v. Pacheco-Ortiz*, 889 F.2d 301, 309, 311 (1st Cir. 1989) (noting the "consistent recognition by both the courts and the Department of Justice of the wisdom of target warnings" and finding "misconduct" where such warnings were not given).

In any event, it is clear that at the time of her testimony, Ms. Russell was not a mere witness; in the grand jury, the prosecutor questioned Ms. Russell about the precise conduct that subsequently formed the basis for the predicate acts with which she was charged, as well as pursued other lines of questioning suggesting Ms. Russell's involvement in criminal activity. She was asked about [redacted] an individual, Harris Decl., Ex. C at 72:12-16, the movement and storage of cash, *id.* at 61:1, 65:23-24, the maintenance of tax returns for companies affiliated with NXIVM, *id.* at 63:21-22, crimes [redacted] *id.* at 56:7-9, and an individual being [redacted] *id.* at 61:7-9. Indeed, based on the prosecutor's own conduct and statements, it seems clear that Ms. Russell, at the time of her grand jury testimony, was certainly a *subject* of the grand jury's inquiry and most

likely a putative defendant. Thus, the government's communications to her and her counsel, or lack thereof, in advance of the testimony, were misleading.

While the government now claims that it only "developed evidence making [Ms. Russell] *chargeable* with racketeering conspiracy" after her grand jury testimony, it fails to realize that a "putative defendant" does not mean the individual is chargeable with the particular offense the government intends to charge – here a racketeering conspiracy. Harris Decl., Ex. H. Rather, the test is objective – whether the witness could be charged with *any* crime. *Crocker*, 568 F.2d at 1054.

In this respect, the facts of this case are analogous to those at issue in *United States v. Drake*, 310 F. Supp. 3d 607 (M.D.N.C. 2018). There, the government advised the defendant that she was not a target of its investigation and, in reliance on that representation, she testified before the grand jury. *Drake*, 310 F. Supp. 3d at 612. While the government claimed that the defendant had not *formally* been identified by the United States as a target of its investigation until three years after she testified, when its investigation shifted focus to different and more serious crimes, the Court found that the government nevertheless had "substantial evidence linking her to the commission of *a* crime" at the time of her grand jury proceeding. *Id.* at 624-25 (emphasis added). Noting that misleading statements concerning the witness's status "affected all stages of th[e] proceeding," *id.* at 625, the Court explained that "[i]n a situation where the prosecutor either declines to comment on a witness's target status or notifies a witness of their target status, defense counsel considers the prosecutor's silence or statement and advises the client accordingly . . . On the other hand, where a witness's target status is misrepresented, defense counsel is prevented from intelligently rendering such advice." *Id.* The Court concluded that "allowing the Government to backtrack on affirmative representations made to [the defendant]

and her counsel appears to . . . approach contravention of concepts of fundamental fairness ensured by the Fifth Amendment's due process clause." *Id.* at 635.

Here, in addition to misleading Ms. Russell with respect to her status as a witness, subject or target, the prosecutor gave Ms. Russell, outside the presence of her attorney, improper legal advice concerning the scope of Ms. Russell's Fifth Amendment rights. It is simply not correct to say, as the prosecutor did to Ms. Russell, that in order to assert the Fifth Amendment you [redacted] have a [redacted] or that you can invoke the right only if the question asked [redacted] Harris Decl., Ex. C at 9:12-15. Rather, a witness need only show a "reasonable possibility" that her testimony "will *incriminate* h[er]." *Estate of Fisher v. C.I.R.*, 905 F.2d 645, 650 (2d Cir. 1990) (emphasis added). As the Second Circuit has noted, not only does the danger of self-incrimination (a concept distinct from prosecution) exist in "answers that would in themselves support a conviction under a federal criminal statute," but it also exists in "[answers] which would *furnish a link in the chain of evidence* needed to prosecute the claimant for a federal crime." *United States v. Chandler*, 380 F.2d 993, 997 (2d Cir. 1967). Importantly, a witness may refuse to answer questions "designed to draw information as to [her] contacts and connection with the [target of the investigation]," since those questions "could easily . . . require[] answers that would *forge links in a chain* of facts imperiling petitioner with conviction of a federal crime." *Hoffman v. United States*, 341 U.S. 479, 488 (1951); *see also United States v. Lumpkin*, 192 F.3d 280, 285 (2d Cir. 1999). Thus, the fact the AUSA misrepresented Ms. Russell's status *and* misadvised her as to the scope of her Fifth Amendment rights, created "the potential to mislead and induce [Ms. Russell] into waiving her Fifth Amendment rights and testifying." *Drake*, 310 F. Supp. 3d at 634-35; *see also Babb*, 807 F.2d at 279 (suggesting that "assurances" that a grand

jury witness is not a "target" or "subject" might "lull[] [the] witness into giving incriminating statements"). *Cf. Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (holding that an individual who is told by law enforcement that there is a warrant to search a home cannot be deemed to have consented to such search because "[w]here there is coercion there cannot be consent").

While the Court in *Drake* stopped short of dismissing the indictment, that was because the witness there did not make incriminating statements that "furnish[ed] a link in the chain of evidence needed to prosecute the claimant." 310 F. Supp. 3d at 635-36 (quoting *Ohio v. Reiner*, 532 U.S. 17, 20-21 (2001)). Here, Ms. Russell provided those links in spades. Ms. Russell waived her rights on a vast array of topics and gave statements that made clear that she was close to and had knowledge of, NXIVM operations. *See e.g.*, Harris Decl., Ex. C at 15 (testifying that she has been involved in NXVIM since 2001); *id.* at 17, 32 (testifying that she was a proctor and coach); *id. at* 45 (testifying that she's taken the ESP curriculum, the SOP Complete curriculum, and JNESS); *id.* at 46-49 (describing certain NXVIM-related entities and events, including JNESS, JNESS Tracks, SOP, SOP Complete, and V-Week). In a case that charges Keith Raniere's "inner circle" as the RICO enterprise, such testimony would clearly form a link in the chain of evidence needed to prosecute Ms. Russell. *See id.*, Ex. D ¶ 3. For example, that Ms. Russell testified that she [redacted] *id.*, Ex. C at 32:20-22, and that as a proctor she [redacted] *id.* at 32:23-24, including coaching the [redacted] course, *id.* at 17:17-20, is incriminating, given that the government has alleged that the members of the enterprise "held high positions" in NXIVM or DOS, *id.*, Ex. D ¶ 2, and that "rank within Nxivm is a reasonable proxy in identifying categories of individuals who are likely to be co-conspirators or witnesses in this case." Dec. 14, 2018 Gov't Letter (ECF No. 244) at 2.

But it is not just her *waiver* of Fifth Amendment rights that prejudiced Ms. Russell. Ms. Russell selectively *asserted* the Fifth in response to many of the questions posed, raising yet an additional specter of unfair prejudice. While there is no legal requirement prohibiting prosecutors from putting properly advised targets in front of a grand jury, policy and practice counsel against it. *See, e.g., United States v. Winter,* 348 F.2d 204, 207–8 (2d Cir. 1965). In fact, the DOJ Manual explicitly states that if a target of an investigation asserts that they will refuse to testify on Fifth Amendment grounds, "the witness ordinarily should be excused from testifying." DOJ Manual § 9-11.154. The ABA Project on Standards for Criminal Justice also instructs that:

> The prosecutor should not seek to compel the appearance of a witness whose activities are the subject of the grand jury's inquiry, if the witness states in advance that if called the witness will claim the constitutional privilege not to testify, and provides a reasonable basis for such claim.

ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function, § 3-4.6(h). The justification for this policy is self-evident: the only reason for subpoenaing a target to the grand jury would be to have the grand jury impermissibly draw an adverse inference. *See* Marvin E. Frankel & Gary P. Naftalis, *The Grand Jury: An Institution on Trial* 75 (1977).

Over the course of her two-hour testimony, Ms. Russell asserted her Fifth Amendment rights to a variety of questions, including questions regarding her job as a bookkeeper, Harris Decl., Ex. C at 32:10-13, her role in maintaining tax returns for companies affiliated with NXIVM, *id.* at 63:21-23, cash being brought from outside the country, *id.* at 65:23-25, cash being stored at Nancy Salzman's house, *id.* at 61:1-2, the Fernandez family, *id.* at 62:1-4, Clare Bronfman, *id.* at 59:23-24, [redacted] *id.* at 56:7-10, questions regarding somebody [redacted] for long periods of time, *id.* at

61:8-10, and certain questions regarding DOS, *see, e.g.*, *id.* at 51:4-5, 55:10-11. Her invocation of the Fifth in front of the grand jury risked allowing them to draw an adverse inference against her when considering whether or not to return an indictment against her. The risk was compounded by the AUSA's incorrect legal advice about the scope of the privilege against self-incrimination. Given that the jury understood the assertion to be made only because Ms. Russell [redacted] or because the answer would have a [redacted] *see* Harris Decl., Ex. C at 9:13-15; *see also United States v. Ciambrone*, 601 F.2d 616, 622 (2d Cir. 1979) ("As a practical matter" the grand jury "must lean heavily upon the United States Attorney as its . . . legal advisor . . . to furnish it with controlling legal principles"), there is a substantial possibility that the grand jurors would improperly draw a negative inference from her assertion of the right.

In short, the government's statements regarding Ms. Russell's status before the grand jury, along with its misleading advice regarding her invocation of the Fifth Amendment, were fundamentally unfair and induced Ms. Russell to selectively assert the Fifth and provide incriminating statements to the deliberative body that was ultimately asked to return an indictment against her. The Indictment should be dismissed.

II. ALTERNATIVELY, THE COURT SHOULD COMPEL ADDITIONAL DISCOVERY

In the alternative, the Court should compel the government to produce discovery and conduct an evidentiary hearing. Specifically, the government should be required to produce: (1) any documents reflecting when Ms. Russell became a "target," as that term is defined by the DOJ Manual; and (2) the legal instructions given to the grand jury concerning Ms. Russell's assertion of the Fifth Amendment. In addition, because of the prosecutor's inaccurate representations concerning the scope of the Fifth Amendment privilege, *see* Harris Decl., Ex. C

at 8:5-11, 9:12-16, 9:18-20, as well as her inappropriate statements to the grand jury concerning the content of government court filings and the nature of its investigation, *id.* at 41:18-42:6 – essentially amounting to unsworn testimony – the Court should compel production of the grand jury minutes, either to counsel or to the Court *in camera*, relating to the Fifth Amendment warnings provided to every witness, as well as any legal instructions given on the same topic.[3] An evidentiary hearing should follow.

First, in response to discovery requests, the government has refused to identify what evidence it "developed" *after* Ms. Russell's grand jury testimony that purportedly "made her chargeable with racketeering conspiracy" and "only then a putative defendant." Harris Decl., Ex. H. Again, what makes an individual a "putative defendant" is not limited to whether or not she can be charged with a specific type of crime – *i.e.*, a racketeering conspiracy – nor does it turn on a prosecutor's subjective intent – whether a particular individual *should* be charged with a crime. Rather, the cases make clear that the standard is objective, whether an individual *could* be charged with *any* crime. *See United Stated v. Crocker*, 568 F.2d 1049, 1054 (3rd Cir. 1977) ("[T]he test as to whether a witness is a target of a grand jury investigation cannot be whether he 'necessarily' *will be* indicted, but whether according to an objective standard he *could* be indicted." (emphasis added)). In order for the Court to assess whether any evidence "developed" by the government *after* Ms. Russell's grand jury testimony objectively transformed Ms. Russell from a mere witness to a target, or instead simply changed the government's view of *whether* she should be charged, the government should be required to (i) disclose what it knew about Ms.

[3] The government's production could be redacted, if necessary, to protect witness names or other confidential information that is unrelated to the Fifth Amendment warnings given to the grand jury or other legal instructions given relating to the privilege.

Russell at the time of her grand jury testimony; (ii) disclose what evidence was "developed" thereafter; and (iii) produce all related documents.

Portions of the grand jury minutes should also be produced. Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) specifically provides for disclosure of grand jury matter when a defendant "shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). In addition, while Rule 6(e) provides a presumption of secrecy regarding "matter occurring before the grand jury," in the interest of justice, a defendant can overcome this presumption by showing a "particularized need" for disclosure. *See* Fed. R. Crim. P. 6(e); *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222–23 (1979); *see also Dennis v. United States*, 384 U.S. 855, 871-72 (1966) (holding that petitioners were entitled to examine grand jury minutes); *Vazquez v. City of New York*, No. 10 CIV. 6277 (JMF), 2013 WL 2449181, at *1 (S.D.N.Y. June 6, 2013) (ordering disclosure of grand jury minutes); *see also United States v. Wong*, 78 F.3d 73, 83 (2d Cir. 1996) (matter remanded to District Court to determine if disclosure of minutes "will assist [that defendant in his] collateral attack on the conviction by providing evidence that a witness lied at trial and before the grand jury."); *United States v. Hoey*, No. S3 11-CR-337 (PKC), 2014 WL 2998523, at *3 (S.D.N.Y. July 2, 2014) (granting motion for *in camera* inspection of grand jury instructions). "A party makes a showing of particularized need by proving 'that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.'" *In re Grand Jury Subpoena*, 103 F.3d 234, 239 (2d Cir. 1996) (quoting *Douglas Oil*, 441 U.S. at 222).

Here, there is a particularized need. Erroneous advice to witnesses concerning the Fifth Amendment, as well as incorrect legal instructions concerning the significance of any witness's assertion of their rights, would be grounds for dismissal of the indictment, and not just as to Ms. Russell. Grand juries perform the historic role of "function[ing] as a shield, standing between the accuser and the accused, protecting the individual citizen against oppressive and unfounded government prosecution." *United States v. Hogan*, 712 F.2d 757, 759 (2d Cir. 1983). A grand jury's ability to fulfill this role depends on prosecutors strictly observing the status of the grand jury as an independent legal body, avoiding possibly misleading the grand jury, and, when providing legal instructions, doing so in a full and accurate manner. *Id.*; *see also United States v. Brito*, 907 F.2d 392, 395 (2d Cir. 1990) ("[C]areless instructions . . . tend to hamper the grand jury's understanding."). Failure of the prosecutor to follow such standards may lead to dismissal of the indictment provided there is "grave doubt that the decision to indict was free from the substantial influence" of the errors. *United States v. Peralta*, 763 F. Supp. 14, 21 (S.D.N.Y. 1991) (quoting *Bank of Nova Scotia v. United States,* 487 U.S. 250, 256 (1988)). *Cf. United States v. Williams*, 504 U.S. 36, 51 (1992) (the district court's supervisory power over the grand jury must be used only to "preserve [or] enhance the traditional functioning" of the grand jury).

First, as to Ms. Russell, any instructions concerning *her* assertion of the Fifth Amendment should be reviewed so that the Court may evaluate the extent of the prejudicial impact of her unfairly induced testimony – a mish-mash of Fifth Amendment waivers combined with assertions of the privilege. Targets are not normally subpoenaed at all, let alone forced to plead the Fifth before the grand jury. *See, e.g., United States v. Winter,* 348 F.2d 204, 207–8 (2d Cir. 1965); DOJ Manual § 9-11.154; ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function, § 3-4.6(h). And for good reason: "The only reason for the

charade when it is known that the privilege will be asserted seems to be the planting of a negative inference in the grand jurors' minds, contrary to law." Marvin E. Frankel & Gary P. Naftalis, *The Grand Jury: An Institution on Trial* 75 (1977). In fact, given that obvious risk, even assuming that the government's statement to Ms. Russell was accurate, namely that she was *not* a target within the meaning of the DOJ Manual, there is still potential for prejudice if the government did not properly instruct the grand jurors that they could not draw any adverse inference from Ms. Russell's Fifth Amendment assertions and in fact, that they could not consider those assertions at all. Any failure to give such an instruction, or to do so clearly, would be grounds for dismissal. *See United States v. Twersky*, No. S2 92 CR. 1082 (SWK), 1994 WL 319367, at *4 (S.D.N.Y. June 29, 1994) (an indictment "will not be permitted to stand" if the prosecutor's instructions are "misleading due to mistakes or omissions" (internal quotation marks and citations omitted)).

Moreover, the fact that the prosecutor misadvised Ms. Russell begs the question of what prosecutors told other witnesses who testified in the grand jury. If other witnesses were misinformed of the scope of their Fifth Amendment privilege, the potential unfair prejudice – as to all defendants – is twofold. First, like Ms. Russell, such witnesses could have been induced by the prosecutor's incorrect advice to waive their rights and provide the grand jury with testimony they would not otherwise have given. Second, incorrect advice to witnesses about the scope of the Fifth Amendment privilege risks misleading the grand jury as to the meaning and significance of "pleading the Fifth" – a misimpression that would be compounded were the accompanying legal instructions inaccurate or incomplete.

This is not a fishing expedition. The government's on-the-record statements to Ms. Russell concerning her status, combined with its inaccurate statement of the law concerning the

scope of the Fifth Amendment privilege, has raised the real possibility that other witnesses were misadvised and the grand jury therefore misled. Accordingly, the government should produce those portions of the minutes relating to the Fifth Amendment warnings given to all grand jury witnesses, as well as any related legal instructions.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Indictment as to Kathy Russell, or, in the alternative, compel the government to produce discovery and conduct an evidentiary hearing.

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Respectfully submitted,

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