



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

MKM:MKP/TH/MJL/KMT
F. #2017R01840

*271 Cadman Plaza East
Brooklyn, New York 11201*

April 26, 2019

By Hand and ECF

The Honorable Nicholas G. Garaufis
United States District Judge
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Keith Raniere
Criminal Docket No. 18-204 (NGG) (S-2)

Dear Judge Garaufis:

The government respectfully writes in opposition to the defendant's Second Motion to Suppress (DE 574-76). For the reasons set forth herein, the Court should deny the defendant Keith Raniere's untimely motion to suppress certain evidence seized from a house located at 8 Hale Drive in Halfmoon, New York, filed more than a year after the basis for such a motion was known to Raniere and more than 14 weeks after the January 9, 2019 deadline set by this Court for motions to suppress. Raniere does not attempt to meet the "good cause" standard for untimely motions to suppress set forth in Rule 12(c)(3) and, to the extent Raniere intends to challenge the warrant as overbroad,¹ insufficiently particular,² or to challenge the government's seizure of the hard drive that contained the images of child pornography, those arguments were available to him prior to the Court's deadline for motions and should be rejected as untimely. See generally United States v. Yousef, 327 F.3d 56, 124-25 (2d Cir. 2003) ("A strategic decision by counsel not to pursue a claim, inadvertence of one's attorney, and an attorney's failure to timely consult with his client are all insufficient to establish cause.").

¹ See, e.g., Br. at 8 ("The warrant in effect permitted a search of the entire premises"), 9 (asserting that the warrant is "the sort of general warrant that is anathema to the Fourth Amendment").

² See, e.g., Br. at 9 (citing United States v. George, 975 F.2d 72, 75 (2d Cir. 1992)).

To the extent Ranieri challenges only the execution of the warrant with respect to the images of child pornography that the government first identified to the defendants by sealed letter dated February 22, 2019 (DE 362), and that underlie Racketeering Acts 2, 3 and 4 (Br. at 7-8), his motion is timely, but meritless. As set forth below, the government discovered the images Ranieri seeks to suppress on a hard drive seized pursuant to a search warrant authorized on March 26, 2018 (the “March Warrant”). (Att. 1). Magistrate Judge Kuo authorized a second warrant to search the hard drive for additional images of child pornography on February 22, 2019 (the “February Warrant”). (Att. 2).

As described in the February Warrant, the images depict a minor female who was known to law enforcement at the time the images were discovered, and who, subsequent to the photographs, became a first-line DOS “slave.” (Att. 2 ¶¶ 9-10). The minor victim is shown in sexually explicit poses that are similar to those shown in the “collateral” photographs of other DOS members, obtained by the government pursuant to grand jury subpoenas and search warrants for the defendant’s email. (Id. ¶ 11). As such, the photographs are within the scope of the warrant and, in any event, were properly seized under the plain view doctrine. Accordingly, Ranieri’s motion should be denied.

I. Applicable Law

a. Rule 12(b)(3) Motions

Rule 12(b)(3)(C) requires that motions to suppress must be made before trial. Rule 12(c)(1) provides that a district court “may . . . set a deadline for the parties to make pretrial motions” required by Rule 12(b)(3). Rule 12(c)(3) further provides that, “[i]f a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely.” Nevertheless, “a court may consider the defense, objection, or request if the party shows good cause.” Fed. R. Crim. P. 12(c)(3).

Failure to timely move to suppress evidence “operates as a waiver of the right to challenge the subsequent admission of evidence on that ground.” United States v. Klump, 536 F.3d 113, 120 (2d Cir. 2008). The Second Circuit has explained that a district court may only grant relief from an untimely motion “upon a showing of: (1) cause for the defendant’s non-compliance, and (2) actual prejudice arising from the waiver.” United States v. Howard, 998 F.2d 42, 52 (2d Cir. 1993) (emphasis added). To excuse untimeliness, the Court must make factual findings to support its “good cause” analysis. See United States v. Crowley, 236 F.3d 104, 110 (2d Cir. 2000) (holding that district court erred by considering untimely Rule 12(b)(3) motion in absence of finding of “good cause”). Moreover, because the two prongs are conjunctive, the Court need not address prejudice if the defendant fails to establish “good cause.” Id. at 110 & n.8.

A “lawyer’s belated identification of the issue cannot constitute cause affording relief” under Rule 12(c)(3). United States v. Kopp, 562 F.3d 141, 143 (2d Cir. 2009) (citing United States v. Yousef, 327 F.3d 56, 125 (2d Cir. 2003) (holding that attorney “inadvertence”

in recognizing issue is “insufficient to establish cause” for untimely motion (internal quotation marks omitted)). It is equally clear that “[a] strategic decision by counsel not to pursue a claim . . . and an attorney’s failure to timely consult with his client are all insufficient to establish cause.” Yousef, 327 F.3d at 124-25; see also United States v. Robinson, 357 F. Supp. 3d 221, 223-24 (E.D.N.Y. 2019).

b. Scope of Search Warrant

“Like all activities governed by the Fourth Amendment, the execution of a search warrant must be reasonable.” United States v. Lustyik, 57 F. Supp. 3d 213, 230 (S.D.N.Y. 2014) (citing United States v. Ramirez, 523 U.S. 65, 71 (1998)). Accordingly, “[a] search must be confined to the terms and limitations of the warrant authorizing it.” United States v. Matias, 836 F.2d 744, 747 (2d Cir. 1988).

Where items outside the scope of a warrant are seized, “[t]he retention of [those] items . . . can be justified only if the Government meets its burden of demonstrating that those items fall within an exception to the warrant requirement,’ such as the plain view exception.” United States v. Lustyik, 57 F. Supp. 3d 213, 230 (S.D.N.Y. 2014) (quoting Doane v. United States, 2009 WL 1619642, at *10–11 (S.D.N.Y. June 5, 2009)); see also United States v. Galpin, 720 F.3d 436, 448 (2d Cir. 2013) (when evidence seized from computer files pursuant to a defective warrant, one of the “proper next steps” is to determine “whether the challenged evidence was in plain view when it was seized”). “The plain view exception authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity.” United States v. Gamble, 388 F.3d 74, 76 (2d Cir. 2004) (internal quotation marks omitted). The belief that an item in plain view is evidence of a crime need not “be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.” Texas v. Brown, 460 U.S.730, 742 (1983) (internal quotation marks omitted); see also Lustyik, 57 F. Supp. 3d 231-32 (applying plain view doctrine and denying motion to suppress).

II. Discussion

a. Raniere’s Motion Should Be Dismissed as Untimely

To the extent Raniere challenges the warrant as facially overbroad, Raniere has made no effort to establish good cause for his untimely motion and none exists. The residence at 8 Hale Drive was searched on or about March 27, 2018, the warrant and supporting affidavit was disclosed to Raniere and his counsel on August 3, 2018, in the first production of discovery materials in this case, bearing bates numbers NXIVM00002169-2230, and the drive containing the images of child pornography was disclosed to defendants in full on October 5, 2018. (Att. 3-4 (cover letters)). Since that disclosure, the government has repeatedly noted in open court and in the presence of Raniere and his counsel that no defendant has asserted a privacy interest in 8 Hale Drive. For example, on March 4, 2019, at an appearance before Your Honor and in the presence of Raniere, the undersigned noted that “[n]o one in this case has asserted any

privacy interest over that house [8 Hale].” (Att. 5 at 24:19-26:14). Neither Raniere nor any of the other remaining defendants contradicted the government’s assertion and, prior to Raniere’s untimely motion, no defendant sought to suppress evidence seized from 8 Hale Drive.

With respect to his facial overbreadth claim, “this is not a situation where the Defendant did not know of the basis for his motion before the deadline expired, only to discover of its existence after it was too late.” United States v. Robinson, 357 F. Supp. 3d 221, 224 (E.D.N.Y. 2019). Indeed, because a facial overbreadth argument is derived from the text of the warrant, Raniere cannot dispute that he was on notice of all the facts asserted in support of his motion to suppress on or before the January 9, 2019 deadline set by this Court. See United States v. Zemlyansky, 945 F. Supp. 2d 438, 450 (S.D.N.Y. 2013) (discussing overbreadth and particularity).

There can be little doubt that Raniere’s decision not to move to suppress on this ground by the deadline set by the Court was a “quintessential strategic decision.” United States v. Kopp, 562 F.3d 141, 143 (2d Cir. 2009). The decision plainly involves a difficult tradeoff that Raniere was likely reluctant to make: in order for Raniere to assert his purported privacy interest in 8 Hale Drive, he was required to concede that “at various times since . . . 2004” he has used 8 Hale Drive “as a private study and . . . a place to live.” (DE 576 (affidavit of Raniere)). This concession significantly limits Raniere’s ability to testify at trial, given the government’s anticipated evidence of Raniere’s activities at 8 Hale Drive, which the government described in the March Warrant as “one of the primary locations where [Raniere] committed the Subject Offenses.” (Att. 1 ¶ 49; see also ¶ 41-48, 50). See, e.g., United States v. Jaswal, 47 F.3d 539, 543 (2d Cir. 1995) (holding that a defendant’s “prior inconsistent suppression hearing testimony [i]s properly used to impeach him when he [takes] the stand during the trial”); Harrison v. Smith, No. 05 CIV. 5953 (JGK), 2012 WL 3822211, at *7 (S.D.N.Y. Sept. 4, 2012) (“Had the defendant admitted to possession for the purposes of the suppression motion, his trial strategy of denying possession would have been ruined.”). That Raniere now regrets his strategic decision does not constitute “good cause,” see Yousef, 327 F.3d at 124–25, and his motion should be denied.

b. The Images of Child Pornography Are Within the Scope of the Warrant

To the extent Raniere challenges the execution of the warrant, his motion is meritless. As an initial matter, Raniere is incorrect that the March Warrant “failed to describe any images . . . for which there was reason to believe would be located at the 8 Hale Drive premises.” (Br. at 8). To the contrary, the affidavit in support of the warrant describes photographs and videos provided by DOS “slaves” as “collateral” (Att. 1 ¶¶ 22, 47), and notes that the “collateral” was provided to Raniere (id. ¶ 47) and would likely be found in 8 Hale Drive (id. ¶ 50, 51a). Accordingly, the warrant permitted law enforcement agents to seize “[c]omputers or storage media used as a means to commit or facilitate the commission of the Subject Offenses (including to store ‘collateral,’ as described in the affidavit).” (Id. Att. B.). The warrant plainly permitted law enforcement to seize the hard drive and law enforcement

relied in good faith on the magistrate's probable cause assessment in doing so. See United States v. Rosa, 626 F.3d 56, 64 (2d Cir. 2010).

The images of child pornography are within the scope of the warrant and were properly seized from the hard drive. As described in the February Warrant, the images that Raniere seeks to suppress are part of a collection including "two digital images of a juvenile nude female exposing her vagina" (Ex. 2 ¶ 11), including one in which the minor victim's "legs are open and her inner labia are visible" (id. ¶ 11b). The original complaint against Raniere (attached and incorporated into the March Affidavit as Exhibit 1), describes Raniere's collection of materially similar photographs in connection with the crimes of sex trafficking and forced labor. As set forth in the complaint, a DOS "master" identified as CC-1 "regularly required her slaves to pose for nude photographs, including on one occasion close-up pictures of their vaginas, either as assignments or collateral." (Att. 1, Ex. 1 ¶ 48). CC-1, in turn, sent these photographs to Raniere. (Id.)³

Given this context, it defies common sense to assert, as Raniere does, that the sexually explicit photographs of the minor are not "evidence, fruits and instrumentalities" of the crimes listed in Attachment B to the warrant. As an initial matter, the images subsequently became the basis for Racketeering Acts 2, 3 and 4, and they are therefore plainly related to "involv[ement]" in violations of 18 U.S.C. § 1962. Moreover, because the minor victim depicted in the images later became the first DOS "slave," the images constitute "evidence regarding the formation and structure of DOS." (Att. 1, Att. Ba.). For the same reason, the images also constitute "communication[] between RANIERE and any DOS masters/slaves." (id.). And, although DOS was not formed until 2015, these images are plainly relevant to the concept of "collateral," and are evidence of, inter alia, Raniere's motive, opportunity, intent, preparation, plan, knowledge, absence of mistake and lack of accident. There is no legal

³ At the Court's request the government will make available the images of child pornography for in camera review. Redacted examples of collateral (where the emphasis on close-up images of the women's vaginas is apparent, despite the redactions) were attached to Exhibit A of Katherine Cassidy, Esq.'s affidavit in support of Clare Bronfman, Nancy Salzman and Kathy Russell's motion to suppress, filed under seal on January 9, 2019.

support for Ranieri’s assertion that, under these circumstances, agents lawfully reviewing the contents of the drive⁴ were required to turn a blind eye to the images.⁵

c. The Images of Child Pornography Were in Plain View

For these same reasons, even if the images were not within the scope of the March Warrant, it was plain to agents cursorily reviewing the contents of the hard drive that the images were evidence, fruits and instrumentalities of a host of crimes, including those identified in the warrant, as well as violations of 18 U.S.C. §§ 2251, 2252. As noted above, the agents immediately recognized the minor depicted in the images and were aware, from other evidence, that Ranieri had a sexual relationship with her beginning when she was fifteen. (Att. 2 ¶ 11). They also immediately recognized that the minor “appear[ed] to be under the age of eighteen in the images.” (*Id.* ¶ 12). “[G]iven the facts known to the government at the time[,] . . . a person ‘of reasonable caution’ would have believed those emails constituted evidence of

⁴ See, e.g., Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976) (noting that “it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are” among the papers to be seized); United States v. Williams, 592 F.3d 511, 521-22 (4th Cir. 2010) (warrant authorized agents to open each file on computer and review contents, at least cursorily, to determine whether file fell under scope of search warrant); United States v. Graziano, 558 F. Supp. 2d 304, 317 (E.D.N.Y. 2008) (“[I]t was entirely reasonable for [the police forensic examiner] to engage in a cursory review of files and documents [on the computer], by opening them, to determine whether they contained evidence of illegal gambling that was within the scope of the warrant.”); United States v. Fumo, No. 06–319, 2007 WL 3232112, at *6 (E.D. Pa. Oct.30, 2007) (“Regardless of the search protocols or keywords used by the government, the government may open and briefly examine each computer file to determine whether it is within the description recited in the warrant.”); United States v. Scarfo, 180 F. Supp. 2d 572, 578 (D.N.J. 2001) (“Where proof of wrongdoing depends upon documents or computer passphrases whose precise nature cannot be known in advance, law enforcement officers must be afforded the leeway to wade through a potential morass of information in the target location to find the particular evidence which is properly specified in the warrant.”).

⁵ Nor is the date on which the images were created relevant to this assessment. The warrant permits the government to search for evidence, fruits and instrumentalities of Ranieri’s “involv[ement]” in the subject offenses “in or after January 1, 2015.” As set forth above, and as a matter of common sense, evidence created prior to January 1, 2015 can constitute evidence of Ranieri’s commission of crimes on or after that same date. For example, even in the far more restrictive context of trial, evidence of entirely separate criminal acts that predate the charged crimes is admissible under Rule 404(b).



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

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*271 Cadman Plaza East
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August 3, 2018

By Email and FedEx

Marc Agnifilo, Esq.
Brafman & Associates
767 Third Avenue
New York, NY 10017

Re: United States v. Keith Raniere, et al.
Criminal Docket No. 18-204 (NGG) (S-1)

Dear Counsel:

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the government hereby furnishes the following discovery in the above-captioned case, which is Bates-numbered NXIVM00000001 – NXIVM00009177 and VDM_NXIVM00000001 – VDM_NXIVM00004162. This discovery is being provided to you pursuant to the protective order you signed on July 30, 2018 and entered by the Court on August 1, 2018. Where practical, documents have been watermarked “SUBJECT TO PROTECTIVE ORDER” but all materials being produced are subject to the protective order, regardless of the watermark.

Certain materials, as set forth in the chart below, are designated as “Victim Discovery Material,” and where applicable, “Highly Sensitive Material.” Some categories of documents have been designated as “Victim Discovery Material” (“VDM”) or “Highly Sensitive Material” (“HS”) because the process of individually designating the items (for example, individual emails) would have led to a significant delay in production. Consistent with the protective order, the government is open to discussing the designations with defense counsel.

The government will continue to provide discovery on a rolling basis.

I. The Government's DiscoveryA. The Defendant's Criminal History

At this time, the government is not aware of any criminal history, youthful offender or juvenile offender adjudications of the defendant.

B. Documents and Tangible Objects

Enclosed please find 8 encrypted discs containing copies of the following documents:

BATES RANGE	DESCRIPTION	DESIGNATION
NXIVM00000001- NXIVM000000027	Nxivm newsletters	Subject to Protective Order
NXIVM000000028- NXIVM000000095	Nxivm websites	Subject to Protective Order
NXIVM000000096- NXIVM000000103	NXIVM University documents	Subject to Protective Order
NXIVM000000104- NXIVM000000110	Confidentiality agreement	Subject to Protective Order
NXIVM000000111- NXIVM000000116	ESP Rules and Rituals	Subject to Protective Order
NXIVM000000117	Letter for signature campaign	Subject to Protective Order
NXIVM000000118- NXIVM000000167	Pamela Cafritz will and estate proceedings	Subject to Protective Order
NXIVM000000168- NXIVM000000289	SOP Complete materials	Subject to Protective Order
NXIVM000000290- NXIVM000000613	Keith Raniere articles and survey	Subject to Protective Order
NXIVM000000614- NXIVM000000615	SOP-PAH audio and video	Subject to Protective Order
NXIVM000000616- NXIVM000000704	SOP materials	Subject to Protective Order
NVIVM000000705- NXIVM0000001009	ETHOS - Intensives	Subject to Protective Order
NXIVM0000001010- NXIVM0000001012	SOP compensation plan	Subject to Protective Order

BATES RANGE	DESCRIPTION	DESIGNATION
NXIVM00001013	NYT Recordings	Subject to Protective Order
NXIVM00001014	Recording of Keith Raniere on or about April 18, 2017	Subject to Protective Order
NXIVM00001015	Recording of Keith Raniere on or about May 7, 2017	Subject to Protective Order
NXIVM00001016	Recording of N. Salzman on or about November 6, 2016	Subject to Protective Order
NXIVM00001017	Recording of N. Salzman on or about November 8, 2016	Subject to Protective Order
NXIVM00001018- NXIVM00001560	NXIVM Intensive Facilitator Notes and Ethos Facilitator Notes	Subject to Protective Order
NXIVM00001561-NXIVM00001600	NXIVM video files	Subject to Protective Order
NXIVM00001601-NXIVM00002012	Photographs of the execution of a search warrant at 3 Oregon Trail	Subject to Protective Order
NXIVM00002013- NXIVM00002071	Search warrant application for 3 Oregon Trail	Subject to Protective Order
NXIVM00002072- NXIVM00002168	Photographs of the execution of a search warrant at 8 Hale Drive	Subject to Protective Order
NXIVM00002169- NXIVM0002230	Search warrant application for 8 Hale Drive	Subject to Protective Order
NXIVM00002231-8698	Filings related to <u>NXIVM Corp., et al v. Ross Institute, et al.</u> , 06 CV 1051 (D.N.J.)	Subject to Protective Order
NXIVM00008699-9174	Books co-authored by Keith Raniere	Subject to Protective Order
NXIVM00009175- NXIVM00009177	Security footage	Subject to Protective Order
VDM_NXIVM00000001- VDM_NXIVM00000009	Email re: Cafritz memorial	VDM

BATES RANGE	DESCRIPTION	DESIGNATION
VDM_NXIVM00000010- VDM_NXIVM00000013	Dropbox screenshots	VDM
VDM_NXIVM00000014- VDM_NXIVM00002581	SMS messages	VDM/HS
VDM_NXIVM00002582- VDM_NXIVM00002598	Letters	VDM
VDM_NXIVM00002599- VDM_NXIVM00002810	Jane Doe 8 calendar and journal	VDM/HS
VDM_NXIVM00002811- VDM_NXIVM00002815	Collateral	VDM/HS
VDM_NXIVM00002816	KAR emails	VDM/HS
VDM_NXIVM00002817	KAR emails (subset of Yahoo search warrant) ¹	VDM/HS
VDM_NXIVM00002818	Video/Audio re: DOS	VDM
VDM_NXIVM00002819- VDM_NXIVM00003048	Records from [REDACTED]	VDM
VDM_NXIVM00003049- VDM_NXIVM00004162	Notes	VDM

In addition, the government is in possession of the following devices and sources of electronic evidence, among others:

- Information associated with an iCloud account belonging to Lauren Salzman;
- Information associated with an iCloud account belonging to Allison Mack;
- A Samsung Galaxy cellular phone belonging to Allison Mack;
- Information associated with a Dropbox account belonging to Allison Mack;

¹ VDM_NXIVM00002817 is a subset of emails received pursuant to a search warrant executed on the account keithraniere@yahoo.com. Our search of this account for responsive materials is ongoing and we will continue to supplement our discovery production with additional materials that have been deemed responsive.

- Information associated with 
- Information associated with 
- Electronic devices obtained through the execution of a search warrant at 3 Oregon Trail, Halfmoon, New York; and
- Electronic devices obtained through the execution of a search warrant executed at 8 Hale Drive, Halfmoon, New York.

Please note that in an effort to produce discovery expeditiously, full discovery copies of these materials will be produced to all defendants in the coming weeks or as soon as practicable.² You may also examine the physical evidence discoverable under Rule 16, including any original documents, by contacting the government to arrange a mutually convenient time.

C. Reports of Examinations and Tests

The government will provide you with copies of any additional reports of examinations or tests in this case as they become available.

D. Expert Witnesses

The government will comply with Fed. R. Crim. P. 16(a)(1)(G) and Fed. R. Evid. 702, 703 and 705 and notify you in a timely fashion of any expert that the government intends to call at trial and provide you with a summary of the expert's opinion.

The identity, qualifications, and bases for the conclusions of each expert will be provided to you when they become available.

E. Brady Material

The government understands and will comply with its continuing obligation to produce exculpatory material as defined by Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

Before trial, the government will furnish materials discoverable pursuant to Title 18, United States Code, Section 3500, as well as impeachment materials. See Giglio v. United States, 405 U.S. 150 (1972).

² To the extent your client objects to such disclosure, please inform the government as soon as possible and no later than August 8, 2018. Please be advised that any objections may delay the production of discovery.

F. Other Crimes, Wrongs or Acts

The government will provide the defendant with reasonable notice in advance of trial if it intends to offer any material under Fed. R. Evid. 404(b).

II. The Defendant's Required Disclosures

The government hereby requests reciprocal discovery under Rule 16(b) of the Federal Rules of Criminal Procedure. The government requests that the defendant allow inspection and copying of (1) any books, papers, documents, data, photographs, tapes, tangible objects, or copies or portions thereof, that are in the defendant's possession, custody or control, and that the defendant intends to introduce as evidence or otherwise rely on at trial, and (2) any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, or copies thereof, that are in the defendant's possession, custody or control, and that the defendant intends to introduce as evidence or otherwise rely upon at trial, or that were prepared by a witness whom the defendant intends to call at trial.

The government also requests that the defendant disclose prior statements of witnesses who will be called by the defendant to testify. See Fed. R. Crim. P. 26.2. In order to avoid unnecessary delays, the government requests that the defendant have copies of those statements available for production to the government no later than the commencement of trial.

The government also requests that the defendant disclose a written summary of testimony that the defendant intends to use as evidence at trial under Rules 702, 703, and 705 of the Federal Rules of Evidence. The summary should describe the opinions of the witnesses, the bases and reasons for the opinions, and the qualification of the witnesses.

Pursuant to Fed. R. Crim. P. 12.3, the government hereby demands written notice of the defendant's intention, if any, to claim a defense of actual or believed exercise of public authority, and also demands the names and addresses of the witnesses upon whom the defendant intends to rely in establishing the defense identified in any such notice.

IV. Future Discussions

If you have any questions or requests regarding further discovery or a disposition of this matter, please do not hesitate to contact us.

Please be advised that, pursuant to the policy of the Office concerning plea offers and negotiations, no plea offer is effective unless and until made in writing and signed by authorized representatives of the Office. In particular, any discussion regarding the pretrial disposition of a matter that is not reduced to writing and signed by authorized representatives of the Office cannot and does not constitute a “formal offer” or a “plea offer,” as those terms are used in Lafler v. Cooper, 132 S. Ct. 1376 (2012), and Missouri v. Frye, 132 S. Ct. 1399 (2012).

Very truly yours,

RICHARD P. DONOGHUE
United States Attorney

By: /s/ Moira Kim Penza
Moira Kim Penza
Tanya Hajjar
Assistant U.S. Attorneys
(718) 254-7000

Enclosures



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

MKP/TH
F. #2017R01840

*271 Cadman Plaza East
Brooklyn, New York 11201*

October 5, 2018

By Email

Marc Agnifilo, Esq.
Brafman & Associates
767 Third Avenue
New York, NY 10017

Re: United States v. Keith Ranieri, et al.
Criminal Docket No. 18-204 (S-1) (NGG)

Dear Counsel:

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the government is sending you a link to one discovery production this evening in the cover email to this letter. The password for that production is listed below. Additionally, the government is making available through DupeCoop discovery copies of the items numbered DSCV_00000061-62 and DSCV_00000065 below. You may obtain this discovery by calling John Palermo of DupeCoop at (973) 895-1359. Our search as to these items is ongoing.

This discovery is being provided to you pursuant to the protective order entered by the Court on August 1, 2018.

The government will continue to provide discovery on a rolling basis and continues to request reciprocal discovery from the defendant.

BATES RANGE	DESCRIPTION/PASSWORD	DESIGNATION
NXIVM00026761- NXIVM00030116	L. Salzman iCloud—partial search results; search ongoing NXIVM00026761!	Subject to Protective Order
DSCV_00000061	8 Hale Drive, Western Digital storage device, 1B16	Subject to Protective Order
DSCV_00000062	8 Hale Drive, Apple iPod with accessories, 1B50	Subject to Protective Order

BATES RANGE	DESCRIPTION/PASSWORD	DESIGNATION
DSCV_00000065	[REDACTED] SW return	Subject to Protective Order

Very truly yours,

RICHARD P. DONOGHUE
United States Attorney

By: /s/ Moira Kim Penza
Moira Kim Penza
Tanya Hajjar
Assistant U.S. Attorneys
(718) 254-7000

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

2 -----x

3 UNITED STATES OF AMERICA

18 CR 204 (NGG)

4 versus

5 KEITH RANIERE, et al,

United States Courthouse
Brooklyn, New York

April 4, 2019

6 Defendants.

11:00 a. m.

7 -----x

8 TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
9 BEFORE THE HONORABLE NICHOLAS GARAUFI
10 UNITED STATES DISTRICT JUDGE

11 APPEARANCES

12 For the Government:

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13 For K. Raniere:

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CONTINUED APPEARANCES

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1 THE COURT: All right. Everybody be seated, please.
2 Appearances?

3 MS. PENZA: Moira Penza, Tanya Hajjar and Mark Lesko
4 for the United States. Good morning, Your Honor.

5 THE COURT: Good morning.
6 Let's wait for the defendant.

7 MR. AGNIFILO: Thank you, Judge.
8 (Pause in proceedings.)

9 (Defendant Ranieri enters.)

10 MR. AGNIFILO: All right. Good morning, Your Honor.
11 Marc Agnifilo, Teny Geragos, Paul DerOhannesian and Danielle
12 Smith for Keith Ranieri, who is present in court.

13 THE COURT: Good morning.

14 MR. GERAGOS: Good morning, Your Honor. Mark
15 Geragos, G-E-R-A-G-O-S, and Kate Cassidy for Clare Bronfman,
16 who is present.

17 MS. GROSSHANS: Good morning.

18 THE COURT: Good morning.

19 MR. BUCKLEY: Good morning, Your Honor. Sean
20 Buckley for Allison Mack, who is standing to my left.

21 THE COURT: Good morning.

22 MS. HARRIS: Good morning, Your Honor. Justine
23 Harris and Amanda Ravich for Kathy Russell.

24 THE COURT: Good morning. Please be seated.

25 We have potential jurors coming in next Monday

1 afternoon and next Tuesday afternoon. The questionnaires are
2 being printed, and the proceedings will be in the ceremonial
3 courtroom, the Jack B. Weinstein Ceremonial Courtroom on the
4 second floor of this courthouse.

5 And the -- we'll have two attorneys per defendant --
6 of the two attorneys per defendant -- sitting at counsel's
7 table, and everyone will be introduced. We're going to place
8 card this event, so that everyone knows where to sit. So
9 there's no question.

10 And we need a place for the marshals in connection
11 with Mr. Ranieri. We'll work that out with the marshals.

12 MR. AGNIFILO: Yes, Judge.

13 THE COURT: All right. And you can check with
14 Mr. Reccoppa about how we normally do this in these
15 questionnaire cases, of which we have had many.

16 There's an issue regarding a motion for an anonymous
17 jury. Who would like to speak to that?

18 MS. PENZA: Yes, Your Honor.

19 THE COURT: I think it's consented to, but I want to
20 hear about it.

21 MS. PENZA: So not quite an anonymous jury, Your
22 Honor. The Government is requesting that the jury, not that
23 the names be withheld from the press and spoken publicly until
24 after trial, which was done in the Shkreli case and which we
25 think is appropriate here, and so do the defendants.

1 MR. AGNIFILO: We did do it in the Shkreli case. It
2 worked fine. And so we consent. We agree to that, if the
3 Court's comfortable.

4 THE COURT: Well, I think it would have to be made
5 clear to potential jurors that their anonymity would remain
6 until after the trial ends and that -- and then be made --
7 potentially be made available to anyone who asks for it.

8 Is that what you're driving at here?

9 MS. PENZA: That is the Government's position. Yes,
10 Your Honor.

11 THE COURT: That's your position, as well?

12 MR. AGNIFILO: I'm sorry. One second.

13 (Consults with Ms. Geragos.)

14 If I remember with Mr. Shkreli, it's Court's
15 decision after the trial. I don't know that it's
16 automatically -- that the names are unsealed or whatever the
17 term would be -- automatically. It think it's a decision
18 at -- at least we did with Judge Matsumoto.

19 THE COURT: Well, I will tell you that my preference
20 would be to allow members of the jury to speak out if they
21 want, but I don't think that the Court ought to be in a
22 position to make that judgment for a juror. The juror should
23 make that judgment for him or herself.

24 I would always recommend to the jurors that at the
25 end of the trial, whatever their verdict is, that they leave

1 the courthouse and they forget about what happened and go back
2 to, you know, their normal lives and not be subject to press
3 and other interference, if you will, with their normal life
4 activities. And so that's just my view and that's what I'll
5 tell any juror who is in a situation like that.

6 So, if I grant an anonymous jury, it will be
7 anonymous, and it's -- the names of the jurors will not be
8 provided by the Court to anyone, whether before, during or
9 after the trial. And if jurors want to, you know, speak to
10 the press or anybody else, they can do so. So I'm going to
11 grant the motion for an anonymous jury. That's number one.

12 And ironically, these anonymous juries sometimes are
13 granted in cases where there is -- there might be some danger
14 to jurors from -- in some way. I'm not sure what it is,
15 but -- as well as the possibility of the press and other
16 interested individuals may try to access or approach jurors.

17 I think that this is the perfect -- this case is the
18 perfect example where there's -- it would appear there's no
19 actual danger to the jurors, but the idea that a juror, an
20 anonymous juror leaving the courthouse might be stopped by an
21 interested person or by the media, I think that's always a
22 possibility, within the rights of people expressing their
23 First Amendment rights.

24 But I also believe that this should be a
25 semi-sequestered jury, in order to protect the jurors from

1 unwanted interference when they come and go from the
2 courthouse.

3 So I'm going to grant the motion, and I'm going to
4 add to the Court's order that the jury will also be
5 semi-sequestered during the course of the trial. So that
6 takes care of that.

7 Is there any objection? I didn't ask if there was
8 an objection.

9 MR. GERAGOS: No objection.

10 THE COURT: Okay.

11 MR. BUCKLEY: No objection, Your Honor.

12 MS. HARRIS: No objection.

13 MR. AGNIFILO: No objection.

14 MS. PENZA: Your Honor, no objection right now. We
15 do want to -- we will --

16 THE COURT: Oh, I don't care what you think.

17 MS. PENZA: I'm sure.

18 THE COURT: I really don't, because it's usually the
19 Government that asks for a semi-sequestered jury, but in this
20 case, the Court wants a semi-sequestered jury, so we're going
21 to have one. So don't bother bringing it up with anybody
22 unless you plan to go to the Second Circuit on it.

23 MS. PENZA: Thank you, Your Honor.

24 THE COURT: Okay. Let's take it from there. What
25 else do we have here today?

1 MR. AGNIFILO: So we'd like to get the Court's
2 thoughts on a date for in limine motions. We -- the
3 Government has started providing 3500 material. It seems to
4 be doing it alphabetically. We have, I don't know, A through
5 G or something like that.

6 So, I guess it's a two-part request: One, we'd like
7 a date when we will get the rest of the 3500 -- and I know
8 these things are sometimes on a rolling basis. That's part of
9 the Court's order. But the more 3500 we get, the better our
10 in limine motions would be.

11 THE COURT: Where are we on 3500 material? You want
12 a deadline? I can always give you a deadline.

13 MS. PENZA: We would prefer not a deadline, Your
14 Honor.

15 THE COURT: Well, I understand.

16 MS. PENZA: We are diligently working to produce it.

17 THE COURT: Well, we have a trial date of --

18 MS. PENZA: April 29th.

19 THE COURT: -- April 29th.

20 MS. PENZA: And so we have --

21 THE COURT: Assuming we're going forward on
22 April 29th, I've already denied one motion for a month
23 extension of the trial date.

24 When will you have the 3500 material to the defense?

25 MS. PENZA: I mean, we are continuing to roll it

1 out. We anticipate making an additional production tomorrow,
2 and we'll continue to produce through next week, as well. And
3 then of course, that's what's currently in our possession,
4 Your Honor.

5 MR. AGNIFILO: So my two cents, Judge, would be if
6 we can get -- and I know that there's continuing interviews,
7 so there's going to be more 3500 up until the trial and
8 probably well into the trial. That's what I expect.

9 But if we can get what they have now say by the
10 middle of next week, we can put our in limine motions together
11 in say four days, and maybe have something to the Court the
12 following Monday.

13 THE COURT: How about Wednesday the 10th of April
14 for what you have now?

15 MS. PENZA: Your Honor, there is like a technical
16 component to it, and I'm not sure we will be able to actually
17 get out all of it by the 10th.

18 THE COURT: How about the 12th?

19 MS. PENZA: The 12th, Your Honor.

20 THE COURT: The 12th.

21 MR. AGNIFILO: And then we can have our --

22 THE COURT: How about your motions by the 17th?

23 MR. AGNIFILO: That's fine, Judge. That's very
24 good. Thank you. Perfect.

25 THE COURT: Okay. And that works for everybody?

1 MR. GERAGOS: The 17th works for us.

2 THE COURT: Okay. That's on the in limine motions.
3 What else do we have?

4 MR. AGNIFILO: We have a technical issue that I'll
5 let the Government raise about some discovery that they
6 provided, that we -- that we found and then have to give back,
7 but I'll let the Government brief that one to the Court.

8 MS. PENZA: So Your Honor, as you are aware, we had
9 had an issue regarding one of the discovery devices. When we
10 had initially produced the device, we did not know that there
11 were child pornography images on the device. We retracted all
12 of those. They -- we then -- there was --

13 THE COURT: Were there images in connection with
14 this case on the device?

15 MS. PENZA: Yes, Your Honor.

16 We then -- we then reproduced the device. We did
17 eliminate the folder that had the child pornography; however,
18 there were additional carved deleted files of that -- those
19 same images, I believe the same ones, in other locations on
20 the drive.

21 The FBI is working right now to create a new version
22 of the drive that has removed those deleted images, which we
23 will provide hopefully today to the defendants and receive
24 from them back the original drives that we had. So it's the
25 second drive that we had given them.

1 The Government does want to raise the issue that we
2 put in our -- in our response to the defendant's motion. In
3 particular, there have now been two assertions by defense
4 counsel regarding their ability to prepare on the predicate
5 acts related to child pornography.

6 THE COURT: Yes.

7 MS. PENZA: And so, the Government is obviously
8 concerned by those representations. I understand that this
9 drive is something that they want to provide to their expert.
10 And so given that, we -- that concern is again raised, that
11 they may need additional time to prepare their expert for
12 those additional charges.

13 THE COURT: I see.

14 MS. PENZA: And so we want to make sure that we are
15 proceeding to trial with the defendant and his counsel saying
16 that they are, indeed, prepared to go forward on April 29th,
17 contrary to what they had put in two previous motions.

18 THE COURT: All right. Let me hear from Mr.
19 Agnifilo.

20 MR. AGNIFILO: Yes, Judge.

21 I don't think we ever said that we couldn't be
22 ready. I think the phrase I used is we were going to move
23 heaven and earth to be ready and we're still going to move
24 heaven and earth to be ready.

25 We have a very productive dialogue with the

1 Government around these matters. I think what the Government
2 produced and then needed back was through mere inadvertence,
3 and we caught it. We saw there was something on the drive
4 that should not be in the public sphere.

5 We contacted the Government. We said, we have to
6 give this back to you. We knew that would end up in some sort
7 of a delay in getting the drive, which is an important piece
8 of evidence in terms of these charges that were recently
9 indicted.

10 And here's my request -- and I think the Government
11 will work with us on this because they have been working with
12 us on this -- to the extent that we can front-load whatever
13 reports there might exist that relate to the alleged child
14 pornography charges, that -- getting that that sooner rather
15 than later would be very helpful to us.

16 And so we do have an expert. The expert's been down
17 to the FBI. The Government was very responsive when I asked
18 for dates. They accommodated our dates. Our expert went
19 down. I expect they'll accommodate our other dates.

20 So as long as we're continuing to be as productive
21 as we've been -- and I think that will continue -- I fully
22 expect to be ready for those charges and all the charges on
23 the trial date.

24 So, it's a lot of work. It's a lot of work being
25 done at the last minute, but this is what happens in trials

1 and that's what happening here. And the Government's been
2 accommodating and responsive, and I'm sure we can get it done.

3 MS. PENZA: Your Honor, if I may, frankly, that
4 doesn't -- that doesn't satisfy the Government. It doesn't
5 sound like they're in a place to say right now.

6 And in terms of front-loading the information
7 regarding child pornography, Mr. Agnifilo knows that the
8 alleged victim of the child pornography charges goes
9 throughout this case. I mean, there will be almost -- there's
10 very little evidence in this case that does not relate to that
11 victim.

12 And so, the Government is going to abide by the
13 Court's deadline. We're going to produce everything. But
14 given that, the Government is concerned that we are not
15 hearing a clear statement from Mr. Agnifilo and Mr. Raniere,
16 frankly, that they are ready to go.

17 And given that -- we understand that there are
18 jurors coming in. We do understand that the landscape of this
19 case has changed dramatically, and may continue to change over
20 the coming days.

21 If that is the case, the Government does not
22 anticipate that our trial will last as long as we have
23 previously said to the Court, because we don't believe there
24 will be -- there won't be six defense attorneys
25 cross-examining witnesses, for example.

1 And so given that, the Government, you know, the
2 Government feels that there has not been a representation that
3 they will be ready on April 29th, and the Government believes
4 that it's important to have certainty right now.

5 THE COURT: Well, let me cut to the chase on this.
6 You know, while the Court is reserving judgment for the moment
7 on the pending motions to dismiss and sever, I agree.

8 The Court -- the Court needs to know the answer to
9 the following questions. And this is from each of the four
10 defendants: Are you prepared for trial? Pardon me. Will you
11 be prepared for trial on the second superseding indictment on
12 April 29th, and if not, how much more time do you need to be
13 fully prepared for trial?

14 I think that's a really essential consideration for
15 the Court. The Court wants to honor its objective of going to
16 trial April 29th, but not -- but not if I do not hear a
17 declaration, in effect, from each of the defendants' counsel,
18 on behalf of the defendants, that they're going to be prepared
19 to go to trial on April 29th.

20 So, of course, we'll start with you, Mr. Agnifilo,
21 because I agree with the Government, to the degree that there
22 needs to be an affirmative statement that based on what's in
23 the second superseding indictment, that you -- which is a
24 recent indictment -- that you will still be ready to go to
25 trial.

1 MR. AGNIFILO: I'll be ready to go to trial, and I
2 mean, and I say that because I do need help from the
3 Government. They have been giving me that help. I'm going to
4 need to have my expert going to the FBI. They have been
5 accommodating of that.

6 This little wrinkle with having to give the drive
7 back is not perfectly timed, but we can get through that. I'm
8 told that I'm going to get a new drive soon. Maybe today.
9 That would be wonderful.

10 But I'm going to make it work. I mean, I have an
11 expert on retainer. He's working for us. He's given me an
12 assurance that in his opinion, that he has been doing this for
13 decades, he can get the work done that I need done by the
14 29th. So I expect to be ready for trial.

15 My request -- and maybe I wasn't as clear as I could
16 have been. I know who the person is in the photographs.
17 That's not the point. I just believe that there's going to be
18 some sort of FBI reports in regard to that part of the FBI
19 investigation regarding the photographs, that if we could get
20 sooner rather than later, that would be helpful to me, but I
21 will be ready to go, representing Mr. Raniere on the Court's
22 trial date.

23 THE COURT: Yes, Mr. Geragos?

24 MR. GERAGOS: Thank you, Your Honor. We will be
25 ready to go on the 29th.

1 THE COURT: All right.

2 MS. HARRIS: Yes, Your Honor.

3 You know in our March 22nd letter to the Court, we
4 indicated in connection with our renewal of our motion to
5 sever, enjoining the motion to sever Ms. Bronfman, that we did
6 advise that we were in plea negotiations with the Government,
7 and that the Government had indicated that given the pressure
8 of trial preparation and the fairly abbreviated schedule that
9 we have been on, that additional time would be beneficial to
10 conclude those negotiations.

11 And we'll say, given the Court's denial of the
12 motions that were made by counsel for Ms. Mack for an actual
13 adjournment of the trial date, I think substantial progress
14 has been made.

15 So I think that the Government's in a better
16 position to speak to, you know, that particular issue than --
17 we have, of course, been preparing for trial, but that's the
18 only aspect of this that bears as to Ms. Russell.

19 THE COURT: Yes?

20 MR. BUCKLEY: Yes, Your Honor. Sean Buckley on
21 behalf of Ms. Mack.

22 THE COURT: Yes.

23 MR. BUCKLEY: As the Court is aware, we are the ones
24 who did file a motion for the continuance, and we recognize
25 that Your Honor has denied it. Our motion was to permit us to

1 engage in what have been and what continue to be fruitful
2 discussions regarding potential resolution of this.

3 But other than that, we are similarly situated to
4 Ms. Harris and her client.

5 THE COURT: Well, as to Ms. Russel and Ms. Mack,
6 it's the old story. You need to be able to walk and chew gum
7 at the same time in this business.

8 And we have one defendant who's incarcerated, and so
9 I look very carefully at that kind of request, and I also look
10 at the difficulty of impaneling a jury, since we have already
11 sent notices to 500 potential jurors that I'm going to be
12 interviewing in mid-April, and if I interview them in
13 mid-April and tell them that they're going to have to come to
14 court and try a case in June and July, we're in a much
15 different posture than we would be if we're telling the
16 potential jurors that we're going to start the trial in April.
17 So it creates a complication.

18 But I think that my sense is that all of the
19 defendants can be ready to go to trial. The defendant with
20 the greatest difficulty will be Mr. Ranieri because there are
21 additional charges of significance against him in the second
22 superseding indictment, but I have Mr. Agnifilo's clear
23 declaration that he and his client will be ready to go to
24 trial. And I also have Mr. Geragos, who is a recent addition
25 to Ms. Bronfman's trial team, and he's ready to go to trial.

1 So I would ask everyone to redouble their efforts to be ready.

2 Anything else on that?

3 MS. PENZA: Your Honor, I guess the only thing I
4 would say is, we don't feel like it is crystal clear from Mr.
5 Agnifilo. We don't. And we are concerned that we are in a
6 position where Mr. Agnifilo wants the process to continue, and
7 we get that. And we are very actively working to do 3500, to
8 get all of this done, while simultaneously engaging in all the
9 other trial preparations, while engaging in plea negotiations
10 with other defendants. We get that. And we are doing our
11 best.

12 But I guess what we are -- what we put in our motion
13 is that, respectfully, if there is a two to three week
14 adjournment where the jurors are impaneled -- the jurors come
15 in on the day that we expect them to come in, then there is no
16 risk at that point that at the end of all of this,
17 Mr. Agnifilo -- Mr. Raniere says, you know what? I didn't
18 stand up there. Mr. Agnifilo stood up there, and he said that
19 it would be April 29th, and said he would be ready.

20 And so given that these are very serious new
21 allegations, given that there are two representations from the
22 defendant that they could not be ready, given that we are
23 not -- still not hearing we will absolutely be ready on
24 April 29th -- because I don't think Mr. Agnifilo can say that.
25 His expert hasn't even had the disc that he thinks is

1 important for the expert to have. I don't think we are
2 actually getting a --

3 THE COURT: When will he have the disc?

4 MS. PENZA: We are currently working. Like since
5 he had it, we obviously -- there was a new problem brought to
6 our attention yesterday, it is currently being worked on, Your
7 Honor. So we are --

8 THE COURT: This week?

9 MS. PENZA: No. Right -- well, right now. And so
10 we're hoping to --

11 THE COURT: Here's --

12 MS. PENZA: Yes. By tomorrow -- I mean, we're
13 hoping to do it today or tomorrow.

14 THE COURT: All right. Let's take this one week at
15 a time.

16 Next Monday, after we appear before the venir, we'll
17 adjourn to this courtroom, and I will ask defendants' counsel
18 at large the same question that I just asked. Let's see where
19 we are then.

20 And if we need to adjourn for a short period -- not
21 a month, but a short person period, it may become more
22 apparent after Mr. Agnifilo and his colleagues have reviewed
23 the materials that you're going to send them.

24 MS. PENZA: Fair enough, Your Honor.

25 THE COURT: So --

1 MR. AGNIFILO: More than fair, Judge. Thank you.

2 THE COURT: Fair?

3 MR. AGNIFILO: Yes. Very much so.

4 THE COURT: The idea that we would put the trial off
5 for a week or ten days, the actual opening of the trial, is
6 not something that would create an impression that we're just
7 pushing this case down the road. A month is a different
8 story.

9 But I know that there are lots of moving parts here,
10 and I'm willing to work with you, but I'm not willing to hold
11 this case open until August. Well, meaning that -- the end of
12 the trial in August, I don't think that that works for
13 anybody, and I think that it works -- and the injury is the
14 greatest for the person who's being detained.

15 So, you know, if next week, Mr. Agnifilo says we
16 need an extra week in order to get all of our materials in
17 order and have further meetings, and so forth, then I'll take
18 that into account.

19 But, I don't want to convey the impression that I'm
20 willing to just push this case, you know, into the fall or
21 some such thing.

22 MS. PENZA: And nor does the Government want it
23 pushed into the fall or any such thing. What the
24 Government -- what the Government wants is to know that Mr.
25 Ranieri is going to have had full opportunity to prepare his

1 defense, so that after the trial, that's protected.

2 THE COURT: Okay. I heard you.

3 MS. PENZA: Oh, no. I'm sorry.

4 THE COURT: There's more?

5 MS. PENZA: No. I just wanted to -- I did want to
6 raise one additional issue before we finish, but whenever you
7 want to hear it.

8 THE COURT: We're not finished yet. Go ahead with
9 your issue.

10 MS. PENZA: So one of the additional things that the
11 Government wanted to raise is the issue of the privileged
12 materials.

13 So there are still approximately 22,000 documents
14 that appear -- that only our privilege team has access to
15 that, that were recovered from Ms. Bronfman's account. There
16 are a significantly few number, but I think approximately 2000
17 documents from Mr. Ranieri's account. It may be less than
18 that -- that have not been provided -- and those documents
19 have not been provided to any other defendant. So they have
20 only gone -- they have only gone to Ms. Bronfman or to Mr.
21 Ranieri, respectively.

22 The Government has -- the Government is concerned
23 regarding our disclosure obligations. We have received
24 consent from Ms. Bronfman's counsel to provide those to the
25 other defendants, and consent from Mr. Ranieri's counsel to

1 provide those to the other defendants. So we are going to
2 work towards a stipulation as to that.

3 But the Government does want to put a few things on
4 the record regarding these privileged documents. So as Your
5 Honor knows, we have not -- we have not -- the Government has
6 not been able to review those documents.

7 In December of 2019(sic), the Government put in a
8 motion asserting that a number of the privileges that were
9 being raised by the defendants were improper. That motion has
10 not been decided.

11 There were various motions in between that. One
12 of -- there -- this is case, as we said a number of times,
13 where some of the -- these are not the normal types of
14 attorney/client privilege. Some are. But many of the
15 privileges being asserted are not the normal types of
16 attorney/client privileges that we see.

17 And so we have been in a problematic posture, the
18 Government, because we can't go one-by-one, and now that we
19 have had -- we have actually gotten to a place where we
20 provided I believe about five thousand documents to counsel
21 for Ms. Bronfman several weeks ago. Counsel for Ms. Bronfman
22 said, I'm too busy with trial prep to review those documents.
23 And Judge Scanlon basically understood that. She said, okay.
24 I understand trial prep.

25 It feels like unclean hands here, Your Honor. So we

1 have Ms. Bronfman saying, "Ready for trial. Ready for trial.
2 Ready for trial," but she hasn't had to review the documents
3 and is just getting to assert these fantastical privileges and
4 Government doesn't get to review the documents.

5 THE COURT: You want a decision on your motion?

6 MS. PENZA: We want a decision on our motion.

7 THE COURT: Okay.

8 MS. PENZA: And then if I may, Your Honor. There is
9 one very -- there is one very key component. We have asked --
10 our privilege team has made additional motions that the trial
11 team has not been privy to.

12 THE COURT: I'm sorry. This is before me or before
13 Judge Scanlon?

14 MS. PENZA: Before Judge Scanlon.

15 THE COURT: Oh.

16 MS. PENZA: But there is an issue that is very ripe
17 now. I mean, this is all very ripe. We're at trial in less
18 than a month, and we haven't seen these documents. And the
19 Government does have rights, too. And so that's fine. We're
20 going to meet our disclosure obligations, but of course, we
21 would like to review whatever documents we can prior to that
22 date.

23 So, one of the key issues that was raised by our
24 privilege team -- and we were not allowed -- Judge Scanlon
25 ruled that we cannot see the motion even in redacted form.

1 That being said, one of the things we understand was asserted
2 was that NXIVM is no longer an operating company and
3 therefore, has no privilege to assert. And so the vast
4 majority of these documents would be NXIVM's privilege.

5 And so in our motion, we requested -- I understand
6 that NXIVM, says that they are still operating -- and the case
7 law bears out that they have the burden to do so, to show that
8 they are operating -- and to say, who is asserting privilege
9 on behalf of NXIVM?

10 And so the Government's concern is that it's Ms.
11 Cassidy and Ms. Bronfman who are asserting the privileges, who
12 aren't saying that this is, you know, who aren't -- and this
13 is a defunct company, and the Government is at a disadvantage
14 because we're not allowed to see the documents. And so it's a
15 real problem now.

16 And the attorneys for NXIVM is clearly in direct
17 communication with defendants. It seems that everything that
18 happens goes through them. And so we have a real problem with
19 that because there are thousands -- over 20,000 documents that
20 the Government hasn't been able to review at all.

21 THE COURT: I hear you.

22 MS. PENZA: Just one last point, Your Honor.

23 THE COURT: Of course.

24 MS. PENZA: There is -- there are documents related
25 to one of the residences, and it's 8 Hale, and it's a

1 residence that people here now about, and it is a -- that is
2 where there was a recovery of the drive that had the child
3 pornography in it.

4 No one in this case has asserted any privacy
5 interest over that house. There is no understanding from the
6 Government as to how NXIVM Corporation can be asserting
7 privilege over materials found -- over materials that would
8 otherwise be privilege in that house.

9 We have spoken to -- we have tried to be
10 communicating with counsel for NXIVM for this. We only
11 received a question yesterday from counsel for NXIVM, where
12 counsel said, well, I understand there may be privileged
13 documents in there.

14 The Government concedes that there are documents
15 that NXIVM would assert a privilege on those drives. The
16 question is, was this privilege maintained? Was the
17 confidentiality of this privilege maintained. And there has
18 been no effort from anyone to assert that.

19 And so now, it's every category of these documents,
20 where the Government's hands have been tied and we haven't
21 been able to review them. So those are the categories, Your
22 Honor.

23 THE COURT: All right. Thank you.

24 MR. AGNIFILO: Can I offer just my suggestion on
25 this? So counsel for NXIVM has been participating in the

1 proceedings before Judge Scanlon, mostly by telephone because
2 he's not based in the city.

3 THE COURT: Where is he?

4 MR. AGNIFILO: Mike Sullivan?

5 MS. PENZA: He's in Massachusetts, Your Honor.

6 THE COURT: He's in Massachusetts?

7 MS. PENZA: Yes.

8 THE COURT: All right.

9 MR. AGNIFILO: So this is something that -- I don't
10 know how Your Honor is inclined to deal with it, and we have
11 been talking about all these issues with Judge Scanlon at
12 great length. No one other than the counsel for NXIVM can
13 tell the Government or us what, if any, position they have on
14 these NXIVM privileged documents.

15 We're all going in be in court on Monday and
16 Tuesday, anyway. If it's such a pressing issue, we can figure
17 out -- maybe if we get in front of Judge Scanlon or if Your
18 Honor wants to deal with it, Your Honor.

19 THE COURT: Why don't you contact Judge Scanlon and
20 ask to meet with her on Monday at some point in the afternoon
21 regarding this issue?

22 MS. PENZA: Yes, Your Honor.

23 THE COURT: And the Court will a provide Judge
24 Scanlon with a transcript of this proceeding, so she knows of
25 the Government's concerns.

1 MS. PENZA: Yes, Your Honor.

2 THE COURT: All right?

3 Yes, Mr. Geragos?

4 MR. GERAGOS: Do you want me to talk with the clerk
5 about dates for agreed-upon for-cause challenges or strikes or
6 things like that, or try to meet and confer? Is the 11th the
7 date you want that by?

8 THE COURT: Well, the 8th and 9th, we'll have the
9 jurors in to fill out questionnaires. I'm not sure when they
10 get the questionnaires. (Confers with the law clerk.)

11 Traditionally, the Government has reproduced the
12 questionnaires. Ms. Ward has been in charge of that -- in
13 your office.

14 And we're not going to interview -- the first thing
15 that has to happen is you can start with a first, let's say,
16 one hundred of the questionnaires, and you may have consensual
17 strikes on some of them. Those that you have the strikes on,
18 they're consensual. They're out. But where both sides
19 believe that the individual should be interviewed or one side
20 thinks the individual should be interviewed, you know, send me
21 a list on that within 24 hours of receiving the questionnaire.

22 MR. GERAGOS: Just as a practical matter, we'll get
23 it in a randomized order, so that we then can do that on a
24 rolling --

25 THE COURT: You'll get that -- each questionnaire

1 will have a number on it. So it will be in order of the --
2 starting with number one and going forward. And so, you'll
3 receive, let's say the first 50 and then you can review them
4 and go over them, and then you'll see the next 50.

5 MR. GERAGOS: Got it.

6 THE COURT: And it will be on a rolling basis, but
7 we can start the following week with interviews in court, and
8 with follow-up questions that you provide to the Court.

9 Let's say the first day, we'll bring in 25 people or
10 maybe 20 in the morning and 20 in the afternoon, and I'll ask
11 follow-up questions, and if you want a sidebar because you're
12 not satisfied with the follow-up, we can do that, too.

13 So I generally interview one person at a time. I'd
14 rather not have more than one person sitting in the jury box,
15 because I don't want to taint the next few with the answers
16 that the first person will likely be answering.

17 It's a slow process, but I'd like to get it all done
18 during the week of the 15th.

19 MR. GERAGOS: Okay. So, we'll meet and confer on
20 whether there are consensual strikes.

21 THE COURT: Right. That's exactly right. We're
22 work all that out with the defense counsel.

23 MS. PENZA: Yes, Your Honor.

24 MR. AGNIFILO: Just one question. In Your Honor's
25 experience, do you think this is the appropriate case, given

1 the issues, to give both sides more peremptories or no?

2 THE COURT: I have to think about that because I'm
3 concerned that -- as to whether I'm going to have the 60
4 jurors that I need from whom to select 12 jurors and six
5 alternates.

6 MR. AGNIFILO: All right. Very good.

7 THE COURT: But if you think there's -- if you want
8 to apply for that in writing, think about it.

9 MR. AGNIFILO: All right. I will. Thank you.

10 THE COURT: And discuss it among yourselves.

11 MR. AGNIFILO: Very good.

12 THE COURT: All right. We have another issue, don't
13 we, regarding counsel Counts 3, 4, 5 and 11? Where are we on
14 that? That venue is in the Northern District of New York?

15 MS. PENZA: Yes, Your Honor. The Government --

16 THE COURT: As opposed to the racketeering acts that
17 are alleged in Counts, I guess, 1 and 2?

18 MS. PENZA: Correct, Your Honor. Yes.

19 So the Government consents to their dismissal
20 without prejudice, and we are in communication with the
21 Northern District about those charges being brought there.

22 THE COURT: All right. So let's do that now, then.

23 MS. PENZA: Okay.

24 THE COURT: Counts 3, 4, 5 and 11 of the Second
25 Superseding Indictment are dismissed without prejudice on

1 motion of the Government. Okay?

2 Do we have anything else from the Government for
3 today.

4 MS. PENZA: Just a few brief matters, Your Honor.

5 For the motion in limine date, the Government would
6 request that on that date, the defendants be required to make
7 any motions they intend to make under Rule 412(b), and the
8 Government would also request that date for motions pursuant
9 to Rule 414.

10 And we also would ask that by that date that the
11 defendants also raise whether they intend to assert any
12 defense of mental disease or defect or duress, or
13 attorney/client privilege, given the issues that we have in
14 not having received -- been able to review the privilege
15 issues that we have in this case.

16 MR. AGNIFILO: We'll raise all those issues by then.

17 THE COURT: All right. The motion is granted.

18 Well, wait a minute. Let me hear from everybody
19 else.

20 MR. GERAGOS: There's no objection.

21 THE COURT: Any objection?

22 MR. BUCKLEY: No objection.

23 MS. HARRIS: No objection.

24 THE COURT: All right.

25 MS. PENZA: Thank you, Your Honor.

1 THE COURT: Your application is granted.

2 MS. PENZA: Thank you.

3 And then finally, the Government has still received
4 no reciprocal discovery from the defendants. We understand
5 that they have stated publicly that they intend to put on a
6 case. We would ask that the defendants be required to produce
7 any reciprocal discovery currently in their possession by the
8 12th.

9 MR. AGNIFILO: That's agreeable. That's agreeable.

10 THE COURT: Anyone else? Anyone object?

11 Mr. Geragos, you're smiling?

12 MR. GERAGOS: Well, I'm just smiling because we
13 got -- we started to get the 3500 yesterday. And so, it seems
14 like that's kind of a tight time frame, and obviously, if
15 something comes up, I'll bring it to the Court's attention.

16 MS. PENZA: Reciprocal discovery is not tied to 3500
17 production, Your Honor. We should have been receiving it all
18 along.

19 THE COURT: All right. Yes. Your application is
20 granted.

21 And anything else from the Government?

22 MS. PENZA: No, Your Honor. Thank you.

23 MR. AGNIFILO: Nothing else from us.

24 THE COURT: Nothing else?

25 MR. GERAGOS: No, nothing else from Ms. Bronfman.

1 MR. BUCKLEY: Nothing else, Your Honor. Thank you.

2 MS. HARRIS: Your Honor, just very briefly.

3 THE COURT: Sure.

4 MS. HARRIS: As the Court knows, there's a pending
5 motion on behalf of Ms. Russell in the round of motions filed
6 in January.

7 There were additional issues that we --

8 THE COURT: Which motion is this?

9 MS. HARRIS: The motion to dismiss based on --

10 THE COURT: Right.

11 MS. HARRIS: -- in the grand jury. Right. I know
12 Your Honor has reserved judgment, reserved decision on that.

13 There were additional issues that we brought to the
14 Court's attention last night based on the first round of 3500
15 material that was produced to us, and to the extent we're
16 here, I just offer -- I know it's a lot of balls in the air, a
17 lot of issues on the plate for the Court as well as the
18 parties -- to the extent there is any oral argument or
19 questions that the Court has about that motion, we're
20 available.

21 THE COURT: All right. Thank you. Thank you very
22 much. All right. Thank you, everybody.

23 Oh, and we will meet immediately after we meet with
24 the venir on Monday, so make a list of anything that you have
25 because we're getting closer to trial, and I would like to

1 resolve everything that's outstanding in the next few days,
2 particularly the motions such as the motion to dismiss on the
3 part of Ms. Russell. We're going to get to it. Thank you
4 very much.

5 MS. PENZA: Thank you, Your Honor.

6 MR. AGNIFILO: Thank you, Your Honor.

7 MR. GERAGOS: Thank you, Your Honor.

8 (Proceedings concluded.)

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