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December 11, 2019

**VIA ECF**

Honorable Vera M. Scanlon  
United States Magistrate Judge  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: *United States v. Raniero, et al.*, 18-cr-204 (NGG)

Dear Judge Scanlon:

On behalf of our client Clare Bronfman, we write in response to the government's letter motion dated November 22, 2019 (ECF No. 814).

The government seeks reconsideration of Judge Garaufis's 4/26/19 ruling affirming the Orders of this Court dated 4/4/2019. The government asserts that reconsideration of those decisions is appropriate under the local civil rule addressing such motions because of information the Court "overlooked." ECF No. 814 at 2.

Notwithstanding the label the government has affixed to its motion, the government is not alerting the Court to matters that either this Court or the District Court overlooked. Rather, it is alerting the Court to what it believes are changed circumstances related to NXIVM corporate entities since the dates of the decisions earlier this year – decisions that were correct and well-founded. As the government has not cited a proper basis for reconsideration, we ask the Court to deny the government's motion on that basis alone.

If the Court decides to entertain the government's motion, Ms. Bronfman opposes the reopening of the privilege litigation as it relates to the documents seized from her email account. We note that since the date of her guilty plea, Ms. Bronfman has resigned from the board of NXIVM. She has no ability to assert or waive a privilege on behalf of the corporation, which power remains with NXIVM's counsel. Garaufis Mem. at 6 (holding that NXIVM's counsel had the power to assert or waive the privilege on behalf of NXIVM, and that Bronfman could not unilaterally waive privilege over communications she had with NXIVM's counsel). We defer to

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NXIVM's counsel as to all matters related to NXIVM's privilege and its corporate status.<sup>1</sup> As explained below, however, Ms. Bronfman objects to the reopening of the extensive privilege litigation which was conducted before this Court earlier this year.

To begin with, it is not clear what relief the government is seeking through its motion for "reconsideration" of NXIVM's privilege or what the implications of such a reconsideration would be at this stage of the proceedings. The government appears to be seeking access to more than the limited set of documents as to which privilege issues were fully litigated and were addressed in Judge Garaufis's 4/26 Order. *See* Gov. Letter at 4.

If the government is seeking access to documents that were addressed in Orders by this Court which were not appealed to the District Court, the government has waived its right to review of those decisions by failing to timely object to them pursuant to Rule 59. *See* Fed. R. Crim. P. 59; *United States v. Ballares*, 317 F. App'x 36 (2d Cir. 2008).

Moreover, if the government is seeking access to NXIVM documents which were never addressed by the previous privilege litigation and this Court's orders, as its letter seems to suggest, this would require reopening the time-consuming process that the parties engaged in before this Court over several months in 2018-19 before Ms. Bronfman pled guilty.

As the Court may recall, from the documents seized from Ms. Bronfman's email account alone, there were approximately 24,000 documents that were segregated and withheld from Prosecution Team review because they were potentially privileged.<sup>2</sup> The government's Privilege Review Team ("PRT") and Bronfman's counsel engaged in a process in which the PRT identified selected batches of documents that it did not believe were privileged from the approximately 24,000 potentially privileged documents. The PRT addressed approximately 2,300 documents in in this fashion. Bronfman's counsel then determined whether we agreed with the PRT's assessment of the documents as not privileged (which we did in many cases), or whether we believed a valid privilege applied, and the parties met and conferred. Only a small number of documents, 249, remained in dispute after this meet-and-confer process and were litigated. *See* Bronfman's Motion, ECF No. 363; Privilege Review Team's Opposition, ECF No. 448.

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<sup>1</sup> With respect to the issue of whether NXIVM still has the ability to assert a privilege, we note that the issue is not as straightforward as the government would have the Court believe. We attach as Exhibit A a transcript of proceedings in the District of New Jersey from October 2, 2019 in *NXIVM Corp. v. Ross Institute, et al*, 06-cv-01051.

<sup>2</sup> We only address those aspects of the government's motion that bear on the potentially privileged documents seized from Ms. Bronfman's email account. Counting documents that the government had obtained from other defendants or sources, we believe the number is closer to 40,000. *See* January 18, 2019 Privilege Review Team's Letter to Judge Scanlon, ECF No. 290.

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The vast majority of the potentially privileged documents have *not* been reviewed by either the PRT or Bronfman’s counsel, and are not easily segregated into “NXIVM privilege” and personal privilege categories. Many of the attorneys with whom Ms. Bronfman communicated by email represented both NXIVM corporate entities and Ms. Bronfman individually in the same or other legal matters; accordingly, sorting out which emails were only subject to a corporate privilege would be time-consuming and require review by both parties. Many emails will raise questions of joint defense privileges and would need to be reviewed by counsel for other individuals. Furthermore, there are numerous corporate entities involved and it may not be easy to sort emails by which corporate entity’s privilege is implicated.

Before undertaking this burdensome process, the Court and the parties are entitled to understand what exactly the government is seeking, the reason why it is seeking these documents at this stage of the proceedings, and the impact any litigation will have on the timeline for the remainder of this case.

Ms. Bronfman has an interest in finality and in protecting her own personal privileges. She needs a fair opportunity to protect any lawful privileges that belong to her, but is entitled to know whether this process, regarding documents seized from her email account pursuant to search warrants executed in March and October 2018, will delay her sentencing, particularly as she has been restricted to home detention since her arrest in July 2018.

We thus respectfully object to the reopening of the privilege litigation, and ask the Court to deny the government’s motion, or in the alternative require the government to provide further information about what documents it is seeking in its motion, and what process it envisions for resolving any disputed privilege issues in those documents.

Respectfully submitted,

/s/

Kathleen E. Cassidy

cc: All parties (by ECF)

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

NXIVM CORPORATION, et al., .  
 .  
 Plaintiffs, .  
 . Case No. 06-cv-01051  
 vs. .  
 . Newark, New Jersey  
 ROSS INSTITUTE, et al., . October 2, 2019  
 .  
 Defendants. .  
 .

TRANSCRIPT OF TELECONFERENCE  
BEFORE THE HONORABLE CATHY L. WALDOR  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (APPEARANCES continued)

2

3 For Juval Aviv,  
4 Interfor, Inc.:

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1 (Commencement of proceedings at 2:51 P.M.)

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3 THE COURT: Okay. On the record. Thank you.

4

5 NXIVM versus Ross, 06-1051. It's 2:51,  
6 October 2nd. And we are on the record. We are good.

6

7 So there's a motion to withdraw for -- from  
8 Mr. Crockett? --

8

(Simultaneous conversation)

9

10 MR. CROCKETT: -- yes, Your Honor. Robert Crockett  
11 on the line.

11

12 THE COURT: And who else is withdrawing?

12

13 MR. ENGLISH: The Tompkins McGuire firm.

13

14 THE COURT: Oh. Right. Right. Sorry.

14

15 So how can I possibly do that? I mean, Interfor  
16 still has a claim. Is that correct?

16

17 MR. ENGLISH: Well, they have -- they have a --  
18 Judge Hayden ruled in their favor, and they put in a final  
19 statement of what they claimed to be owed.

19

20 THE COURT: Right.

20

21 MR. ENGLISH: And that's basically it.

21

22 THE COURT: So there's an order and judgment for  
23 one million three? Six nine one five seven point five one.  
24 Right?

24

25 And what is outstanding on this case?

25

MR. ENGLANDER: Your Honor, if I may, this is

1 Andrew Englander.

2 THE COURT: Thank you.

3 MR. ENGLANDER: Counsel for Interfor.

4 THE COURT: Yup.

5 MR. ENGLANDER: From Friedman, Kaplan, Seiler &  
6 Adelman.

7 So what -- what's outstanding at this point is --  
8 you're right there's an -- there's a judgment for around 1.3  
9 million outstanding, which has not yet been satisfied.

10 But Judge Hayden had always asked the parties to  
11 provide supplemental information to deal with the firm's  
12 bills from the -- from the time of the trial up until present  
13 and also to calculate prejudgment interest.

14 And Interfor has submitted its supplemental papers.  
15 NXIVM's papers are due, I believe, by October 15th. And so  
16 at this point there is not a complete --

17 THE COURT: Okay.

18 MR. ENGLANDER: -- and final judgment.

19 THE COURT: Well, how can I possibly relieve you?

20 MR. ENGLISH: Well, Your Honor, I mean, because we  
21 don't have clients. That's why. The clients are gone.  
22 There's no instructions from anybody. Nobody's responding to  
23 us. We don't have anybody to deal with. And beyond that, my  
24 firm's owed a lot of money.

25 So I -- people have gotten out for far less.

1 THE COURT: That leaves --

2 MR. ENGLISH: And there's really not much left to  
3 do. Go ahead --

4 THE COURT: -- NXIVM, a corporation unrepresented.

5 Gee, Mr. Crockett, you fought to get in the case.  
6 Now you're fighting to get out.

7 MR. CROCKETT: Well, this is Robert Crockett  
8 speaking.

9 Yes, at the time, NXIVM was a viable corporation  
10 with lots of what they call coaches working for them. And  
11 it's a big organization. And my bills were getting paid.

12 And since then, as I think everybody knows -- I  
13 don't know if Your Honor knows, but there's been a criminal  
14 trial --

15 THE COURT: I know all about it, but, you see,  
16 sometimes when you don't get paid, you have to stay in the  
17 case, because you got in the case.

18 I -- what do I have to show me --

19 MR. CROCKETT: That's not why we --

20 THE COURT: -- that NXIVM doesn't exist anymore?

21 MR. CROCKETT: I don't know if NXIVM doesn't exist  
22 anymore. But that's -- we're not getting out of the case  
23 because we haven't been paid.

24 THE COURT: Okay.

25 MR. CROCKETT: We're getting out of the case --

1 | we're moving to be relieved because nobody's responding to --  
2 | at least from Crockett & Associates' standpoint, nobody's  
3 | responding to our requests for instructions. Nobody.

4 |           MR. ENGLISH: We're Tompkins McGuire. I mean,  
5 | Nancy Salzman is who we always dealt with. And I've been  
6 | sending things to her criminal attorney, and I've received  
7 | nothing in response.

8 |           MR. ENGLANDER: Your Honor, if I may, this is  
9 | Andrew Englander again.

10 |           To the point as to whether NXIVM still exists, we  
11 | noted in our opposition papers that as recently as this past  
12 | spring, NXIVM was represented in Keith Raniere's criminal  
13 | trial and had authorized its attorneys in that case to assert  
14 | the attorney-client privilege. That attorney had submitted  
15 | numerous filings on the corporation's behalf. And that's  
16 | even after some of the principals had pled guilty.

17 |           And we don't see that anything has changed since  
18 | that point. And so while it's true that -- well, it may be  
19 | true that NXIVM is no longer operating to the extent that it  
20 | was before those events, at least with the case a few months  
21 | ago, attorneys on NXIVM's behalf had certified that it was  
22 | still an entity that had operations and was not defunct.

23 |           MR. ENGLISH: Well, Your Honor, Brian English.

24 |           I spoke to -- well, to say I tried to speak to  
25 | Mr. Englander's talking about a guy named Sullivan who acted

1 as NXIVM's attorney in the Raniere case. I called  
2 Mr. Sullivan's office last week, gave a detailed message and  
3 heard nothing back, consistently with what's been going on  
4 here.

5 MR. CROCKETT: And this is Robert Crockett.

6 I -- I am unaware -- I mean, I haven't been  
7 following the criminal case either remotely, closely, but I'm  
8 unaware that NXIVM has appeared in that case. I'm unaware.  
9 And to the extent there has been appearances in that case,  
10 it's been individuals who have been pleading privileges.  
11 But, again, I don't know if NXIVM is appearing. All I know  
12 is that -- is that I have reached out to people who gave me  
13 directions as NXIVM, and they said we don't want anything  
14 more to do with NXIVM. We're not going to tell you what to  
15 do.

16 And so quite frankly, from my position, if you --  
17 if Your Honor did not remove us or permit us to withdraw as  
18 counsel, at least from Crockett & Associates' standpoint, I  
19 mean what's difference? I don't have the authority to do  
20 anything. Zero. I mean, I've made my -- I've undertaken my  
21 professional obligation to be removed. But I don't --

22 THE COURT: What did you say?

23 MR. CROCKETT: I don't have any authority to do  
24 anything.

25 THE COURT: Well, but I don't know -- tell me

1 | how -- did you contact -- call this Mr. Sullivan just one  
2 | time?

3 | MR. ENGLISH: Well, I called him the one time.

4 | THE COURT: Mr. English, yeah.

5 | MR. ENGLISH: And I have sent numerous things to  
6 | Mr. Soleaway [*sic*] is Nancy Salzman's lawyer. And I've been  
7 | sending -- I've sent him Judge Hayden's decision. I've been  
8 | sending him everything that the Court has entered in this  
9 | case, every filing since August 27th, I guess, was the date  
10 | of the -- or July 27th -- August 27th -- the date of the  
11 | judge's decision, I've been sending him everything and have  
12 | not heard a word in response. I must have sent him 12  
13 | different emails. And Nancy Salzman is the president and our  
14 | client.

15 | MR. CROCKETT: But I guess I would ask  
16 | Your Honor -- this is Robert Crockett. I mean, what would be  
17 | the consequence of leaving us in? I mean, we couldn't file  
18 | any briefs. We couldn't take any positions. We don't have  
19 | authority.

20 | THE COURT: But the two of you are asking me -- I  
21 | don't know that NXIVM has assets. I don't know whether or  
22 | not NXIVM exists. I don't know that just calling a few phone  
23 | calls and not getting a response, and then I leave a district  
24 | judge with an unrepresented corporation and open matters, an  
25 | application that's open.

1 MR. ENGLANDER: Your Honor, that's exactly right.  
2 This is Andrew Englander.

3 And -- and I would add to that that we're not  
4 talking about some indefinite period of time here. I mean,  
5 we're very close to the finish line in this case. NXIVM's  
6 papers are due in less than two weeks.

7 THE COURT: Right.

8 MR. ENGLISH: But we can't consult with anybody,  
9 Your Honor. I mean, that's the problem here --

10 (Simultaneous conversation)

11 THE COURT: Well, then --

12 MR. ENGLISH: -- is a sham better than nothing? I  
13 mean, you know. I don't understand that.

14 THE COURT: Put that in your opposition. I can't  
15 let you withdraw.

16 I'll talk to Judge Hayden and see if she has a  
17 better idea. But I can't leave a district judge with an open  
18 application and a corporation that's unrepresented. And I  
19 don't have any affidavit or certification, I don't think,  
20 about your contacts or Mr. Crockett's contacts or attempts to  
21 contact.

22 MR. ENGLISH: Well, there have been affidavits  
23 submitted.

24 THE COURT: I'm looking at Mr. Crockett's.

25 MR. CROCKETT: Yes, Your Honor. We submitted the

1 application of Chase Tajima -- or the declaration of Chase  
2 Tajima.

3 THE COURT: Who's that?

4 MR. CROCKETT: He's my associate. Last two  
5 speakers IDs were Crockett.

6 THE COURT: Oh.

7 MR. ENGLISH: And then there's one by me, and  
8 there's one by Mr. Crockett.

9 THE COURT: I saw your --

10 MR. ENGLISH: -- were all filed --

11 MR. ENGLANDER: Your Honor, I think you'll see,  
12 when you look at those affidavits that -- in the case of  
13 Mr. Crockett's firm, they don't identify, I think, other than  
14 Nancy Salzman, who they attempted to contact.

15 THE COURT: Right.

16 MR. ENGLANDER: And unless I'm missing something, I  
17 think Mr. English's firm relied on Mr. Crockett to make  
18 those -- make those outreach efforts.

19 THE COURT: August 30th --

20 MR. ENGLISH: No, actually, we made efforts on our  
21 own.

22 THE COURT: On August 30th --

23 MR. ENGLISH: To Nancy Salzman.

24 THE COURT: This is your associate. On  
25 August 30th, one NXIVM contact, whoever that is, informed me

1 she was no longer involved with NXIVM or any of the  
2 decision-making and would not providing guidance. I never  
3 heard back from Ms. Salzman, who you contacted on August 26th  
4 and August 30th.

5 MR. CROCKETT: Yeah, as far as we know --

6 (Simultaneous conversation)

7 MR. CROCKETT: As far as I know, Your Honor --  
8 Robert Crockett -- she's -- I only know Nancy Salzman to be  
9 the president, CEO. I don't know any other officers.

10 THE COURT: There are assets -- does NXIVM have  
11 assets?

12 MR. CROCKETT: I don't know. This is Robert  
13 Crockett. We do not know the answer.

14 MR. ENGLISH: No --

15 THE COURT: I need more.

16 So for now, I am not going to permit you to  
17 withdraw. But I'm going to call Judge Hayden after I get off  
18 the phone. And if anything changes, I'll get back to you.

19 MR. CROCKETT: What would you like more,  
20 Your Honor?

21 THE COURT: I need to know if NXIVM's being  
22 dissolved, if NXIVM -- was NXIVM represented by Sullivan and  
23 one call was made to this Sullivan? What firm is this  
24 Sullivan with?

25 MR. ENGLISH: I think it's called Answorth

1 [phonetic]. I think they're in Massachusetts.

2 MR. ENGLANDER: For Ashcroft.

3 MR. ENGLISH: Ashcroft, that's right.

4 THE COURT: Like the Ashcroft?

5 MR. ENGLANDER: It's called Ashcroft law firm,

6 Your Honor. It's --

7 MR. ENGLISH: They're in Massachusetts. Right?

8 MR. ENGLANDER: That's what it looks like.

9 THE COURT: What's the telephone number? You've  
10 got a phone number?

11 MR. ENGLANDER: 617.

12 THE COURT: 617.

13 MR. ENGLANDER: 573.

14 THE COURT: Mm-hmm.

15 MR. ENGLANDER: 573-9400.

16 And, Your Honor, I'm reading from -- attached to  
17 our opposition papers was a declaration by Mr. Sullivan about  
18 the status of --

19 THE COURT: Right.

20 MR. ENGLANDER: -- of NXIVM. And so that's what  
21 I'm reading from.

22 MR. CROCKETT: Well, may I inquire, does he ask  
23 if -- or does he say that NXIVM is an ongoing entity with  
24 operations?

25 MR. ENGLANDER: He does. He says it quite clearly.

1 MR. ENGLISH: Well, he -- but, once again, that  
2 was -- what? -- five months ago? And -- you know, asserting  
3 the privilege is one thing on behalf of corporation. To get  
4 instruction from a living person is really what the whole  
5 attorney-client privilege -- I mean, the attorney-client  
6 relationship is. We don't have any living people to speak  
7 to.

8 THE COURT: Let me see what Judge Hayden wants to  
9 do. But I told you what any inclination was. If she changes  
10 anything, I'll let you know.

11 MR. CROCKETT: I just have a --

12 (Simultaneous conversation)

13 MR. ENGLISH: Your Honor.

14 MR. CROCKETT: -- I just have a couple of -- maybe  
15 a question, Your Honor. I wonder what the consequence of not  
16 being permitted to remove -- I mean, could we be sanctioned  
17 for not filing a brief or taking some sort of position? I  
18 mean ...

19 THE COURT: Well, the position would be that you've  
20 had -- which should be on the docket in the event I don't  
21 permit you to withdraw -- that you've -- what your attempts  
22 were and that you've had no contact, so you're not authorized  
23 to respond. That preserves your sanctity as well as any  
24 rights on any other counsel that may come in.

25 MR. CROCKETT: All right. Well --

1 THE COURT: But that --

2 MR. CROCKETT: I guess it's better than nothing,  
3 Your Honor.

4 THE COURT: Right. So I will let you know if Judge  
5 Hayden has a different proposal. Okay?

6 MR. ENGLISH: Thanks, Your Honor.

7 THE COURT:

8 MR. CROCKETT: Thank you, Your Honor.

9 (Conclusion of proceedings at 3:05 P.M.)

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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 15 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

10th of December, 2019

\_\_\_\_\_  
Signature of Approved Transcriber

\_\_\_\_\_  
Date

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