

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

: 18-CR-00204 (NGG)

:

v. :

: 225 Cadman Plaza East

KEITH RANIERE, *also known as* : Brooklyn, New York

Vanguard, :

:

Defendant. : November 6, 2018

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TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Appearances continue on next page.)

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APPEARANCES (Continued):

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1 (Proceedings began at 4:07 p.m.)

2 THE COURT: Criminal cause for a status conference,
3 case number 18-CR-204, United States v. Keith Raniere, Allison
4 Mack, Clare Bronfman, Kathy Russell, Lauren Salzman and Nancy
5 Salzman.

6 Counsel, can you state your name for the record
7 starting with the Government?

8 MS. PENZA: Good afternoon, Your Honor.

9 THE COURT: Good morning.

10 MS. PENZA: Moira Penza, Tanya Hajjar and with your
11 permission an intern from our office, Melanie English for the
12 United States.

13 THE COURT: Sure. I have my intern in a private
14 place up here.

15 MS. PENZA: Good afternoon. Yeah. Thank you, Your
16 Honor.

17 THE COURT: All right. Thanks.

18 MR. AGNIFILO: Good afternoon, Your Honor. Mark
19 Agnifilo, Teny Geragos and Danielle Smith on behalf of Keith
20 Raniere and Mr. Raniere is incarcerated. He's waives an
21 appearance here today.

22 THE COURT: Okay. All right. If all counsel could
23 address that point about your client not being here.

24 MR. MCGOVERN: Good afternoon, Your Honor. Bill
25 McGovern together with Sean Buckley on behalf of Allison Mack,

1 who has also waived her appearance here today.

2 THE COURT: Okay.

3 MR. DIAZ: Good afternoon, Your Honor. Hector Diaz
4 for Lauren Salzman. We request Ms. Salzman's presence be
5 waived.

6 THE COURT: Okay.

7 MR. SOLOWAY: Good afternoon, Your Honor. Robert
8 Soloway for Nancy Salzman and she too waives her appearance
9 for today.

10 THE COURT: Okay.

11 MS. HARRIS: Good afternoon, Your Honor. Justine
12 Harris for Kathy Russell. She waives her appearance with the
13 Court's permission.

14 THE COURT: Okay.

15 MS. HARRIS: Thank you.

16 MS. CASSIDY: Good afternoon, Your Honor. Kate
17 Cassidy and Caroline Grossbans [ph.] on behalf of Clare
18 Bronfman and Ms. Bronfman waives her appearance today.

19 THE COURT: Okay.

20 MS. CASSIDY: Thank you.

21 THE COURT: I think we've got everybody. All right.
22 So this is really checking in to make sure everything is
23 moving along. And it's my deputy's thing to counsel at the
24 front table, if you're speaking if you could just please use
25 the microphone because we're making a recording of today's

1 proceeding.

2 So from my perspective there's really just the three
3 issues and -- but you may have others, so I'm happy to hear
4 them. One is just to make sure the discovery is moving along
5 and whether there are any issues. Certainly the Government's
6 growing chart suggests that there have been a fair amount of
7 documents exchanged -- has been a fair number of documents
8 exchanged and some developing issues, I guess, with these new
9 search warrants. Two is just where you think you're going to
10 be on a schedule related to privilege. And the other -- I'm
11 not even sure this is an issue but I guess it is from the
12 docket -- there was the motion filed on 158 and then the stip,
13 I think is at 180, 178, 180. The motion is still outstanding
14 and the question is, is there any reason the motion isn't
15 withdrawn or is there any outstanding issue from that? That's
16 the Nancy Salzman devices point. And if there are or is any
17 outstanding point or points if you could just let me know what
18 that is.

19 So in any particular order? We'll start with the
20 Government.

21 MS. PENZA: Thank you, Your Honor. Would you
22 prefer me to sit or stand?

23 THE COURT: Everybody can stay seated. We --
24 usually I can tell the difference in the trial lawyers and
25 non-trial lawyers. Trial lawyers can't stand sitting. This

1 is a room of trial lawyers and we're making a recording. It's
2 much easier if you are close to the microphone. I'll get a
3 better -- I can hear you and we'll get a better recording.

4 MS. PENZA: Thank you, Your Honor. Regarding
5 discovery the Government believes that we have been proceeding
6 expeditiously and certainly on schedule with what we had
7 proposed to Your Honor taking your point three and in
8 conjunction we have produced an enormous amount of data
9 pursuant to the stipulation. We agree that the motion is --
10 no longer needs to be pending. We believe the stipulation
11 covered that and we have made all of the devices that were
12 accessible to us available to defense counsel from Nancy
13 Salzman's house.

14 And otherwise, we have been complying with the
15 deadlines that we had set and our searches, of course, are
16 ongoing as we've noted. We have obtained additional search
17 warrants for certain data. That is included in -- that we
18 have included some of that in the chart. We do not have the
19 data yet. So in terms of any kind of further discussion it's
20 really impossible to have a discussion regarding how much
21 additional data that will be and kind of our timing on that,
22 but we still believe we are in the proc -- we will be in a
23 process to produce that on a reasonable time -- timetable such
24 that defense counsel will have it in conjunction with all the
25 other dates that have been set.

1 And in terms of privilege, Your Honor, I think that
2 remains -- that's, in our view, the biggest issue right now.
3 Our privilege review team has been working with defense
4 counsel. There are a number of outstanding issues. It is --
5 there are complexities to the privilege analysis. Different
6 defendants have raised different types of privilege as to the
7 same attorneys. There were generalities regarding one of the
8 things that in order for our privilege team to do a full
9 analysis that they need is, what are the representations that
10 the different -- the different attorneys actually represented
11 the defense -- the defendants are claiming that they
12 represented them in because depending on the function of the
13 lawyer there -- it may or may not -- things may or may not be
14 privileged. So there are still a lot of complexities there.

15 We have -- the privilege review team has been
16 speaking to defense counsel and our understanding was that
17 Friday would be a reasonable date for them to answer the
18 outstanding questions. So the Government requested in our
19 letter that Friday be set as a deadline for those -- for those
20 questions to be answered.

21 And so that is the Government's -- the Government's
22 update. We're happy to answer additional questions should
23 Your Honor have them.

24 THE COURT: This is your letter at 188, the Friday,
25 November 9th date that you're proposing?

1 MS. PENZA: Yes, Your Honor.

2 THE COURT: All right. Do you have a sense at all
3 and maybe this is just not the area you're working on, but
4 your colleague will get the information. You describe it as a
5 first step. Any idea how involved the next steps are?

6 MS. PENZA: I think you're -- Your Honor, I believe
7 that there will be certain data that will be easy to either
8 segregate as privileged or non-privileged, but then I do
9 believe that there will be a volume of documents where there
10 is going to have to be some back and forth. There may be
11 able -- they may be able to reach agreements with defense
12 counsel regarding certain documents, but there may -- there
13 may be other more complicated issues that take longer to
14 resolve, but we believe that as of Friday a few days to kind
15 of process what those answers are that we should be able to
16 set a schedule for further -- further resolution of the
17 privilege issues.

18 THE COURT: So I'm basically pushing you on your
19 last paragraph in the letter which is, "Once it" -- and that's
20 meaning the Government -- "has the information described
21 above, the Government will be prepared to promptly inform the
22 Court whether any legal or factual issues" -- sorry -- "any
23 legal or factual disputes exist with regard to claim
24 privileges and to propose a briefing schedule to resolve any
25 remaining issues." Do you have a sense of what "promptly"

1 means in that context?

2 MS. PENZA: So I think we should be able to update
3 the Court by late next week, Your Honor.

4 THE COURT: Okay. All right. Defendants' counsel,
5 anyone in particular.

6 MR. AGNIFILO: I mean, I agree with everything my
7 colleague from the Government said. They're giving us a lot
8 of discovery. I know from our perspective we've been having
9 pretty steady contact with the firewall team, you know, and I
10 think we've been very productive and I think we've been trying
11 to be reasonable and I think that they view us as being
12 reasonable in terms of our privilege decisions. And so I
13 think we've been making a lot of progress. And we think we
14 can -- you know, we can finalize this by Friday.

15 THE COURT: Your response by Friday?

16 MR. AGNIFILO: Yeah.

17 THE COURT: And then your briefing schedule by the
18 following week?

19 MR. AGNIFILO: I mean, I'm not -- what I'd rather if
20 it's possible just to see where the disagreements are -- you
21 know, see where we are on Friday before we set a briefing
22 schedule. I don't know if that's -- if the Court would be
23 amenable to that.

24 THE COURT: If you reduce the amount of work there
25 is --

1 MR. AGNIFILO: Right.

2 THE COURT: -- I'm amenable. I mean, it's a little
3 bit a self-serving question because --

4 MR. AGNIFILO: Yeah.

5 THE COURT: -- I'm going to have to deal with this,
6 so I'd like to know what we're looking at.

7 MR. AGNIFILO: We've been paring it down. I mean,
8 you know, and we've been sort of not trying to make issues
9 where there don't have to be issues. I mean, you know, if
10 there are issues of sort of agency when there's a third party
11 in the mix, who would not be able to where, you know, we
12 haven't been claiming privilege over those things. So I think
13 that we've been trying to, you know, make it -- make it
14 streamlined and make it as easy as possible. So I'm hopeful
15 that we can continue to do that.

16 THE COURT: All right. Do you agree about the
17 stipulation resolving the motion?

18 MR. AGNIFILO: So that's not my client's motion I
19 believe. I think that's Nancy Salzman's issue --

20 THE COURT: Okay.

21 MR. AGNIFILO: -- if I have that right, so I
22 don't -- I would let -- their counsel is here.

23 THE COURT: All right.

24 MR. AGNIFILO: They can talk to that.

25 THE COURT: So you don't have a view? Okay.

1 MR. AGNIFILO: I don't.

2 THE COURT: And any discovery issues for you on the
3 increasing production waiting quickly to cross the 100,000-
4 page threshold?

5 MR. AGNIFILO: Oh, it's -- I can't even imagine how
6 much it is. It's --

7 THE COURT: Is it 96,000? Was that the number?

8 MS. PENZA: No. We have --

9 THE COURT: It's all right. It's just --

10 MS. PENZA: That would have the last -- that's over
11 100,000, Your Honor.

12 THE COURT: All right. All right. So any issues
13 for your client?

14 MR. AGNIFILO: Nothing else.

15 THE COURT: Nothing.

16 MR. MCGOVERN: On behalf of Ms. Mack, we have no
17 issues either on the discovery production. We've reviewed the
18 Government's chart and are comfortable with the pace of
19 discovery and are aware of the remaining deadlines and are
20 comfortable with where we are against that.

21 And on the privilege issue we've not lodged any
22 privileges, so it's not -- there's no issue with us.

23 THE COURT: Let me just go back to the Government
24 for one second.

25 There -- where are the devices that were sent to the

1 FBI and I think as you've described it in the previous
2 conferences you just sort of end up in the queue? Is there
3 any update on whether you're making it to the top of the
4 queue?

5 MS. PENZA: No update, Your Honor.

6 THE COURT: Okay. All right. Counsel on the back
7 row. Concerns about discovery?

8 MR. DIAZ: Right.

9 THE COURT: Any thoughts about privilege?

10 MR. DIAZ: No issues -- no present issues with
11 discovery. We don't have an issue in terms of the privilege
12 as to Lauren Salzman.

13 THE COURT: Okay.

14 MR. SOLOWAY: Hello, Judge. We -- I represent Nancy
15 Salzman. We did enter into a stipulation with the Government
16 that resolved the issues in a motion that they had filed. I'm
17 not sure why the motion is not closed.

18 THE COURT: It may just be administrative on our
19 end. I want to make -- because they're --

20 MR. SOLOWAY: Right.

21 THE COURT: -- you know, sort of dealt with in two
22 different courtrooms and make sure that everybody is on board
23 that the stipulation resolved the motion.

24 MR. SOLOWAY: Yeah, I don't think there is any
25 issues outstanding.

1 THE COURT: Okay. Any other issues, any issue?

2 MS. CASSIDY: Your Honor, on behalf of

3 Ms. Bronfman --

4 THE COURT: Um-hum.

5 MS. CASSIDY: -- I mean, we are the party with the
6 largest number of privilege documents that hit upon the search
7 terms and so we've been dealing with the firewall attorney on
8 trying to resolve those. And as Mr. Agnifilo said, I mean,
9 where there have been issues that have been raised we've, you
10 know, been trying to work through them with the privilege
11 review team.

12 I do want to highlight for Your Honor that while
13 we've been trying to work through the privilege issues on this
14 batch of documents, the Government has just --

15 THE COURT: "This batch" meaning --

16 MS. CASSIDY: This -- this --

17 THE COURT: -- the current 96,000 plus or what are
18 we talking about?

19 MS. CASSIDY: -- current -- the current 16,000
20 privileged documents that hit on privileged terms in
21 Ms. Bronfman's email alone in the time period that was
22 captured under the previous search warrant, you know, we've
23 now learned that the Government has executed a search warrant
24 for additional emails. The Government has told me that they
25 haven't yet received that data so they don't know what the

1 amount is and I don't yet know what the date range is. So
2 that could change substantially the number of privilege
3 documents that we're talking about.

4 And if we're going to brief privilege issues, you
5 know, I would think that the Court might want to handle it all
6 at once, but we just don't yet know what the scope of the
7 privilege issues will be with respect to that new set of email
8 data.

9 THE COURT: I don't have the search warrant. So are
10 they just different in time or what's the --

11 MS. PENZA: Your Honor, the search warrants are
12 still --

13 THE COURT: -- change?

14 MS. PENZA: -- under seal.

15 THE COURT: Okay.

16 MS. PENZA: But we have disclosed that there are --
17 there will be -- we expect there to be additional time -- an
18 additional time period. The Government -- our firewall team
19 will be happy to have like any preliminary discussions with
20 defense counsel about what other types of privilege issues
21 might come up. However, from my own knowledge of the case I
22 would expect that a lot of the privilege issues to the extent
23 they existed for the time period we already have the search
24 warrant on will be the same type of privilege issues that
25 we'll be dealing with for the other -- any other dates.

1 So while there may be some additional issues or one-
2 off issues, I do believe that continuing to try to resolve the
3 issues in the 16,000 documents will get us very far hopefully
4 on the other types of documents.

5 THE COURT: Okay. So to your point would you like
6 to deal with it all together, of course, but I mean, I'm even
7 more in the dark than all of you are as to what these
8 particular issues are. But to the extent there can be some
9 principals decided --

10 MS. CASSIDY: Right. I mean, I agree with what
11 Ms. Penza said about trying to work through the issues on
12 these 16,000. I guess my point was more towards if we're
13 setting a briefing schedule do we -- are we going to do it now
14 or are we going to wait until the full scope of, you know,
15 privileged emails as it's been -- at least the parties have
16 had a chance to discuss.

17 THE COURT: I think it somewhat depends on the time
18 line. The dates that we do seem to know is that defendant's
19 counsel will get back to the Government by the end of the week
20 and then the Government can apply whatever the facts are that
21 are provided there and then you all can have a conversation
22 about what the outstanding issues are. You know, were the
23 production to come in tomorrow in time to look at and run the
24 searches I guess we could collapse everything together, but
25 since you don't know, right, when no one here seems to know

1 when that production is going to happen I don't know if it's
2 practical to wait given all of your other demands in terms of
3 your time. I'm happy to be corrected or informed otherwise,
4 but that's the way it seems. Does anyone have a different
5 view?

6 MS. PENZA: I believe that there will be certain
7 attorneys and certain topics that can be resolved and that
8 some -- that may impact other information we get. It may not,
9 but I think we should see. I think we should see how the
10 discussions go this week. And if there are discussions that
11 Ms. Cassidy and other defense -- or other defense counsel want
12 to have about other issues they anticipate where if they're --
13 if we're talking about a certain attorney now and they think,
14 well, you know, Ms. Bronfman talked to that attorney five
15 years ago about different topics and it may not make sense to
16 deal with this right now, they're going to get other emails,
17 they can have that conversation. But I think in the abstract
18 make a decision that we should wait, not wait doesn't make too
19 much sense. I think we should kind of narrow it with the
20 understanding that the Government has said we are anticipating
21 additional data from other time periods. If there are
22 specific people or specific topics that it doesn't make sense
23 to deal with right this second, we can have that -- they can
24 have that conversation with our firewall team. But I think a
25 lot of progress can be made based on where we are now. And I

1 think the same type of topics are going to be recurring.

2 THE COURT: Right. It just seems to me that given
3 your trial and motion schedule the dates with the district
4 judge waiting too long isn't going to help anybody. So I --
5 in general, yes, if you can do everything together that seems
6 to be the more expeditious way of handling things, right?
7 Everybody is focused and thinking about the issues, but just
8 given the uncertainty I don't know if we can wait. So it
9 seems like it's a moving target, but that's my initial
10 reaction is unless the information that's responsive to the
11 second set or round of search warrants come in soon but, yes,
12 it will be sort of a divided privilege process -- decision-
13 making process with regard to privilege issues. All right.

14 I have you all here. Anybody have any issues?
15 You're on a fairly tight time line to get this case ready for
16 trial and deal with all those preliminary issues, so --

17 MR. AGNIFILO: Well, Judge --

18 THE COURT: Yeah.

19 MR. AGNIFILO: If I could just make one observation
20 or question for the Court maybe to direct to the Government,
21 I'm just wondering whether the Government has a belief based
22 on the new place that we find ourselves in that's reflected in
23 this November 2nd letter as to whether any of the new
24 information that's going to be generated by the new searches
25 or whether the potential superseding indictment that the

1 Government continues to talk about is going to affect anything
2 in relation to the discovery schedule that exists such as it
3 is now or the trial schedule. Because you're -- you know,
4 we're operating here under a belief that we have a fixed
5 schedule and Your Honor is trying to queue to that schedule.
6 And to the extent that the Government has an opinion because
7 they're the ones with the information, we don't know what the
8 new search warrants say. We don't know what the new probable
9 cause consists of to generate new searches and the Government
10 does. So I would just ask the Court to inquire of the
11 Government along those lines and see if we can have an answer.

12 THE COURT: So you're taking Ms. Necheles' place in
13 trying to push for the deadline. To the extent you can answer
14 or willing to answer the question it would be helpful for
15 everybody with regard to their planning. There's definitely
16 two questions in there: (1) given the production that you
17 anticipate what do you think it may do to discovery; and (2)
18 to other deadlines that are further along.

19 MS. PENZA: Your Honor, I believe the Government has
20 been more open than we often are in these cases. We were
21 asked twice by Judge Garaufis and we said we expect a
22 superseding indictment at some point. That being said, based
23 on where we are now we don't anticipate that discovery that we
24 see as continuing from, for example, the additional search
25 warrants that were done on the email -- the email accounts for

1 Keith Raniere and Clare Bronfman as being reasons to extend
2 out the schedule. We believe that those productions in
3 comparison to the many terabytes of data that we have now
4 produced in which the defendants now have time to go through
5 additional data that is produced down the line from those --
6 from those types of searches will pale in comparison to the
7 volume of data that has been produced at this point.

8 So the Government is not viewing those types of
9 searches as something that would extend the deadlines on
10 our -- not deadlines, but dates on our -- in our view.

11 THE COURT: Okay. So are you declining to answer
12 the question about the superseding indictment?

13 MS. PENZA: Yes.

14 THE COURT: Okay. Just to be clear, you know. We
15 asked. You don't have an answer. It's totally -- it's up to
16 the Government to --

17 MR. AGNIFILO: Thank you, Your Honor.

18 MS. PENZA: And --

19 THE COURT: -- to deal with that question as they
20 will.

21 MS. CASSIDY: And just to --

22 THE COURT: Yes.

23 MS. CASSIDY: -- in that vein, Your Honor.

24 THE COURT: Um-hum.

25 MS. CASSIDY: To be clear, that means that the

1 results of the additional search warrants, this new discovery
2 that is, you know, coming as a result of the additional search
3 warrants will not be produced. The Government does not intend
4 to produce that by December 7th.

5 THE COURT: I think you don't know the answer yes,
6 right?

7 MS. PENZA: That's correct, Your Honor. Thank you.

8 THE COURT: I mean -- yeah, if it comes in tomorrow
9 and it's --

10 MS. PENZA: It will depend on our review.

11 THE COURT: -- small -- doesn't sound like it, but
12 they could turn it around fairly quickly and I think it
13 depends on how it falls in any of these other concerns we've
14 talked about over these various conferences. It seems like a
15 great unknown at the moment.

16 That being said, to the extent the information does
17 come into the Government, you know, as much as you can turn it
18 around or at least give some overarching description of it to
19 counsel that would be appreciated because I think it would
20 help everybody with their preparation plans.

21 MS. CASSIDY: Your Honor --

22 THE COURT: Yes.

23 MS. CASSIDY: Sorry. I -- and I just may be
24 confused about the colloquy just now, but do I understand the
25 Government to represent -- I know I'm addressing you, but --

1 THE COURT: That's okay. You can ask the question.
2 Go ahead.

3 MS. CASSIDY: I know I'm not supposed to talk to the
4 other party in court, but the Government to represent that
5 other than material that's still forthcoming in response to
6 surfboards they have produced were they considered to be all
7 of the Rule 16 or is there additional Rule 16 discovery in its
8 possession that is still forthcoming by December 7th?

9 MS. PENZA: There's still additional discovery.

10 THE COURT: Still.

11 MS. PENZA: By December 7th.

12 THE COURT: Yeah.

13 MS. CASSIDY: Okay. And so that's one universe.
14 Then there's the yet-to-be acquired discovery. Okay.

15 THE COURT: All right. Anybody have any other
16 issues?

17 MS. CASSIDY: Does the discovery to be produced by
18 December 7th include the results of the searches on the
19 devices that have been produced in full to all defendants?
20 The devices have been produced in full to us, the devices that
21 are the subject of the stipulation that Your Honor was
22 mentioning. The Government is still going to do the searches
23 to identify items responsive to the warrants. And my
24 understanding is going to be producing those, so I'm just
25 inquiring about the timing of that production.

1 THE COURT: So you're identifying the responsive --
2 potentially subset of data on those devices that the
3 Government believes is responsive to the search warrants?

4 MS. CASSIDY: Correct.

5 THE COURT: I don't know where that is on your list
6 of priorities. Any idea?

7 MS. PENZA: Your Honor, we expect that there will be
8 rolling productions of Bates-stamped documents from devices,
9 but those devices are not devices for which, for example,
10 Ms. Bronfman has standing to challenge. There's a lot --
11 right now -- the issue for discovery is that it's all been
12 made accessible to defendants in the same format that it's
13 accessible to us.

14 So if the question is, what we -- what is responsive
15 from that, that will -- we're not committing to that by
16 December 7th. We -- and our searches are ongoing. We've
17 written about this to the Court already in terms of our
18 ongoing searches. So we are not committing to that by
19 December 7th, but we anticipate that there will be Bates-
20 stamped productions from devices by December 7th, but that
21 there will be additional ones after December 7th.

22 THE COURT: All right.

23 MS. PENZA: But defense counsel has everything.

24 THE COURT: I know but, you know, this is --

25 MR. SOLOWAY: Defense counsel what? I'm sorry.

1 MS. PENZA: That's a different --

2 THE COURT: Everything.

3 MS. PENZA: Everything.

4 THE COURT: You have --

5 MS. PENZA: From the devices.

6 THE COURT: -- Ms. Salman's devices. You know, this
7 is the same conversation we had a month ago or so which is
8 Government is on notice that you have to, you know, work hard,
9 do your best, do other expectations around executing the
10 search warrants in a timely fashion and the defense counsel
11 can raise issues if they believe it's not timely produced.

12 That being said, as you've talked with me and you've
13 talked with the district judge as I've seen from the
14 transcripts, you know, it's not a hard deadline, so we have to
15 see how this evolves and comes out.

16 MS. PENZA: But, Your Honor, December 7th even -- I
17 know we had the debate over the word and whether it was going
18 to be a deadline --

19 THE COURT: Yeah, deadline or date, as you said
20 earlier.

21 MS. PENZA: -- or not and we --

22 THE COURT: Yes?

23 MS. PENZA: And it was agreed that it was not a
24 deadline. But even when we were talking about December 7th,
25 that was about production of discovery, not about completion

1 of searches. That is a very different topic.

2 THE COURT: I don't think defense counsel agrees
3 with you, so --

4 MS. PENZA: Well, then --

5 THE COURT: I mean, you know, we'll have to see
6 where we are.

7 MS. PENZA: But then there has to be briefing.

8 THE COURT: We're not at December 7th. I mean, I
9 don't want to speak for you.

10 MR. SOLOWAY: No. And we --

11 THE COURT: And the big conversation, if I recall it
12 correctly, was -- is proposed analysis about prejudice and to
13 your point there's no prejudice if they have it.

14 MS. PENZA: That is our point, Your Honor.

15 THE COURT: I'm not saying defense counsel agree.
16 I'm not making any decisions. I'm just trying to identify
17 issues that are coming down the pike.

18 MR. AGNIFILO: I think the problem is I think there
19 are a few -- a few issues are all sort of occupying the same
20 space at the same time and I think some of the issues are the
21 Government's continuing to investigate which is their right.

22 At a certain point, you know, there's also district
23 court schedules and there's sort of a fundamental fairness I
24 think that creates these sorts of things. And I think what
25 the Government is trying to do, and I understand from their

1 respect to what they're trying to do it, they want to keep all
2 their options open for as long as they can, so they want to
3 give us discovery. And whether it's a deadline or whether
4 it's a date, they want to keep doing searches after that
5 either with an eye toward developing evidence for the trial or
6 developing evidence for a potential superseding indictment.

7 The problem from our perspective is we're all -- we
8 all have other judges waiting in the wings. Judge Garaufis's
9 case, as far as I'm concerned and as far as he's concerned, is
10 going first but it's not only. And so we're anxious to try
11 and start the trial and know where we stand with all of these
12 dates.

13 The Government -- Your Honor asked the perfect
14 question and the Government gave an answer that it has the
15 right to give, which is we're not talking about superseding
16 indictments and that's fine.

17 So as a result I think try as we might to give
18 definite contours to all of this, there's a certain part of it
19 that really doesn't have any contour because the Government is
20 doing an investigation that only it knows the contours of and
21 we're all sort of waiting to see what comes out of that.

22 So from our perspective we would love the December
23 date to be as much of a deadline as possible and that is argue
24 and then if the Government -- you know, our preference would
25 be that they don't do searches after that because we have a

1 trial soon thereafter.

2 Now, I don't know if there's any mechanism to
3 enforce that. I don't know that there is when it comes to a
4 superseding indictment. If there was, we'd be asking for it.

5 THE COURT: All right. So the superseding
6 indictment I -- there's really nothing for me to weigh on and
7 this is exactly what you said. And the Government, your
8 position is really the conversation we've been having since
9 you first started talking to me and there's desire
10 understandably on the defendants' side to nail down when is
11 the Government's effort to find new information shut down.
12 And as difficult as it for your side to deal with it, it's a
13 question -- it's a balancing question as we've talked about.
14 And we're not there yet and we don't know what the final -- or
15 intermediate final -- the volume will be December 7th or how
16 it's looking going forward.

17 So you've all clearly stated the position and I've
18 said now several times, you know, the Government is expected
19 to work as quickly as it can, as thoroughly as it can, and
20 give you all a fair opportunity to be prepared for the trial
21 and all the motion practice that's going to go on before that.

22 That being said, there are, as the Government has
23 discussed in other conferences, significant logistical and
24 technical challenges to the production. So if -- they can do
25 what they can do and you can make the motions to say this has

1 to stop. That's where we are. Not really any further except
2 that you have gotten a lot of documents since we first started
3 talking about this, so everyone is on notice of the process
4 and you can make your motions accordingly.

5 To the extent we can anticipate them and know
6 they're coming, that's obviously helpful for everybody in
7 terms of planning, but, you know, they're -- but there are
8 conflicting interests and sometimes they are converging,
9 there's a confluence and sometimes they're diverging in terms
10 of your interests and ability to coordinate all this. Look,
11 I'm not saying anything you don't know. We've -- we just get
12 closer and closer and Government -- you know, I don't know
13 what your sense is of how, you know, thoroughly this is all
14 coming together and how you're going to be able to describe
15 your production and on the defendants' side what your
16 prejudice is. Obviously I just touched on one point which is
17 this -- the resolution of -- or mooted out really of the
18 motion by the agreement, but I summarized the Government's
19 position on that issue. There's no prejudice. You already
20 know everything. You could obviously disagree.

21 I don't know if there's much to be said except to
22 keep making this record that everybody is on notice that there
23 are these conflicting concerns and pressure on the Government
24 to keep moving expeditiously. I don't know if anybody else
25 wants to say anything about some particular challenge your

1 client is having or you're having because of this situation.

2 MS. CASSIDY: I would just note it's been a helpful
3 process, Your Honor, before coming to this court, so thank you
4 for the work the Court has put in.

5 THE COURT: I think you're all working a lot harder
6 than I am. I'm trying to avert my need to have to make these
7 decisions, so I appreciate you all trying to work things out.

8 All right. So in terms of time line, we're still
9 working with the date of -- in December and then you think
10 next week is -- you think by the 13th you could have a letter
11 with regard to the privilege or do you think the week after?
12 I mean, it really -- it's -- to state the super obvious, if
13 you can work it out that's better for everybody because you
14 all have, you know, a handle on each of your client's separate
15 interests, but --

16 MR. SOLOWAY: Your Honor, Your Honor --

17 THE COURT: Who is -- yeah.

18 MR. SOLOWAY: Yeah. I would like to just make one
19 other point as quickly as I can. Again, for Nancy Salzman.
20 And I am -- have been sitting here trying to think of ways not
21 to have to say this because we seem to be approaching the
22 conclusion of the conference and that's --

23 THE COURT: Oh, we've got time.

24 MR. SOLOWAY: Yeah.

25 THE COURT: I'm staying up tonight to see what

1 happens.

2 MR. SOLOWAY: Yeah. There's time tonight, that's
3 true.

4 THE COURT: So we've got time.

5 MR. SOLOWAY: But -- and there are, as you've
6 indicated, Your Honor, technical challenges and there's also
7 lots of thorny legal issues underlying the privilege issues
8 and also the issues relating to the Government's motion and
9 the stipulation that resolved it.

10 But in light of the Government's what I would
11 characterize as non-answer to Clare Bronfman's attorney on the
12 question of searches for data among the Nancy Salzman devices,
13 that is within the scope of the search warrant.

14 Okay. I represent Nancy Salzman and we entered into
15 the stipulation and order and it is our expectation that the
16 Government will continue to make the appropriate searches to
17 determine that data that's on those devices that's within the
18 four corners of the search warrant, that which they had
19 probable cause to seize.

20 And while we agree pursuant to the stipulation and
21 order that what we're characterized as full forensic copies of
22 all of the material on those devices would be turned over to
23 all of the defense lawyers, part of that negotiation and
24 resulting order bound the Government to continue to do the
25 searches for that material that is within the search warrant

1 because there is a broader body of material that is in the
2 full forensic images, the full forensic copies that were
3 turned over.

4 And that material is not -- it's impermissible, you
5 know, for the Government to use that material unless they have
6 some basis and Your Honor is indicating that, you know,
7 everybody is -- you know, is making their record and making
8 their position and there are differences. But I just want to
9 state that it's our -- that's our position on behalf of Nancy
10 Salzman that those searches notwithstanding the agreement to
11 turn this all over now so that we could all move forward, that
12 was what we did it. We could all move forward, try to comply
13 with these dates and try to have a trial on the schedule and
14 that's where we are from Nancy Salzman's point of view.

15 THE COURT: Because I understand you're saying
16 nothing about the stipulation should be read by the Government
17 or anyone else to take off the pressure to get the search
18 warrant permitted, searches done as expeditiously as possible.

19 MR. SOLOWAY: Well, the --

20 THE COURT: Is that --

21 MR. SOLOWAY: -- stipulation reads, Your Honor,
22 that -- in one clause that the Government has -- and it's on
23 the record. I mean, it's on the docket.

24 THE COURT: Um-hum.

25 MR. SOLOWAY: The Government has identified and will

1 continue to identify material on the Oregon Trail devices that
2 is responsive to the search warrants authorizing the seizure
3 of the Oregon Trail devices and will produce the materials so
4 identified for counsel for the defendants. We interpret that
5 language to mean that that's what the Government will do.

6 THE COURT: Okay. I don't know that there's a
7 disagreement. Is there a disagreement?

8 MS. PENZA: No, Your Honor. But just to put on the
9 record that additional search warrants on those devices were
10 obtained very recently. Should Mr. Soloway wish to make a
11 motion the stipulation order makes very clear that he does not
12 waive any ability to make motions challenging the Government's
13 search or seizure as to those devices.

14 MR. SOLOWAY: Yeah. I'm assuming that the scope of
15 the warrant has been expanded as to those devices by virtue of
16 the search warrants that we haven't seen. I'm not talking
17 about that.

18 This was on the basis of the search warrant that
19 existed at the time we entered into the stipulation.
20 Obviously the Government unless there's a valid challenge to
21 the probable cause in the new warrants, which there may or may
22 not be, I don't know, but we're just talking about this
23 stipulation that was prepared in advance of the Government
24 notifying us that they had obtained new search warrants. Yes,
25 of course. The breadth of the material is now expanded by

1 whatever the Government put in the new search warrants and
2 whatever new probable cause they articulated.

3 THE COURT: Okay. So just so I'm clear, is your
4 point what I said earlier, which is no one should believe that
5 you having entered into this stipulation takes the pressure
6 off the Government to timely, expeditiously, appropriately
7 execute those search warrants on the devices? Just because
8 they were the subject of the stipulation doesn't change that
9 obligation and --

10 MR. SOLOWAY: Yes, Your Honor.

11 THE COURT: -- are building towards when is this
12 going to stop, at least based on the first round of search
13 warrants?

14 MR. SOLOWAY: Yes, Your Honor. Thank you for
15 stating that.

16 THE COURT: All right.

17 MR. SOLOWAY: Yes, I 100 percent agree with that.

18 THE COURT: You want to say anything?

19 MS. CASSIDY: Your Honor, we don't disagree.

20 THE COURT: All right. It's the second thing you
21 all agree on. All right. Any issues that it would be helpful
22 to raise, put on the record, you anticipate coming up in the
23 next couple of weeks other than this privilege point? And I'm
24 just going to circle back to when can I expect an update, sort
25 of have the Government thinking the end of next week and then

1 counsel suggesting maybe it should be a little later if the
2 privilege discussions could -- are moving along in a
3 productive way. Thoughts?

4 MS. PENZA: Your Honor, if the submission were a
5 letter to the Court identifying areas of potential dispute I
6 think that should be done earlier than later. I think it
7 makes sense to simply highlight for the courts where there are
8 potential issues -- complicated legal issues. We've got
9 third-party waiver issues, joint defense agreements, those
10 types of issues that are not date specific and not document
11 specific.

12 THE COURT: Okay. Let me just give counsel a chance
13 to talk with his colleague.

14 MR. AGNIFILO: I think on our end we're providing
15 the letter to firewall --

16 THE COURT: Friday, right?

17 MR. AGNIFILO: -- AUSA on Friday.

18 THE COURT: Um-hum.

19 MR. AGNIFILO: So on Friday the firewall AUSA will
20 know the issues.

21 THE COURT: And the point is maybe you all can talk.

22 MR. AGNIFILO: Right.

23 THE COURT: And the questions is, how much time do
24 you need to talk before you know that some things -- or at
25 least if you can't resolve it or at least there's a subset of

1 issues that just are not going to be resolved by agreement --

2 MR. AGNIFILO: It makes sense for you to give us a
3 week, I mean, because I think we can probably resolve the vast
4 majority of them.

5 THE COURT: So a week from Friday or what? Okay.

6 MR. AGNIFILO: Right, a week from Friday.

7 THE COURT: Okay. So then I think you're on the
8 same page, right?

9 MR. AGNIFILO: Right.

10 THE COURT: We are looking at the 16th, right?

11 MR. AGNIFILO: Yes.

12 MS. CASSIDY: Your Honor, can I suggest the 19th
13 just because the defense motions are due on Friday, the 16th?

14 MR. AGNIFILO: That's a great point.

15 (Laughter)

16 That's the best point of the day.

17 THE COURT: Yeah. Government, the 19th is fine?

18 MS. PENZA: The 19th is fine.

19 THE COURT: All right. It really is your colleague,
20 so -- right? Your firewall colleague who's going to be having
21 these conversations, so --

22 MS. PENZA: Yes, on the substantive matters, yes,
23 that's true, Your Honor.

24 THE COURT: All right. So if you can just update
25 that colleague about this date. Okay. Anything else?

1 MS. PENZA: Not from the Government. Thank you,
2 Your Honor.

3 THE COURT: All right. Thanks.

4 MS. PENZA: Thank you, Your Honor.

5 THE COURT: Okay.

6 MS. PENZA: Thank you very much.

7 (Proceedings concluded at 4:48 p.m.)

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1 I certify that the foregoing is a court transcript
2 from an electronic sound recording of the proceedings in the
3 above-entitled matter.



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5 _____
6 Ruth Ann Hager, C.E.T.**D-641

7 Dated: November 7, 2018
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