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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	23-CR-146(DG)
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
RACHEL CHERWITZ and	:	September 27, 2024
NICOLE DAEDONE,	:	10:30 a.m.
	:	
Defendant.	:	

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TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE DIANE GUJARATI
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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1 A P P E A R A N C E S: (Cont'd)

2 REPORTED BY:
3 Kristi Cruz, RMR, CRR, RPR
4 Official Court Reporter
5 kristi.edny@gmail.com

6 Proceedings recorded by computerized stenography. Transcript produced by
7 Computer-Aided Transcription.

8 * * * * *

9 (In open court.)

10 THE COURTROOM DEPUTY: All rise. The Honorable
11 Diane Gujarati is now presiding.

12 You may be seated.

13 *United States of America versus Rachel Cherwitz*
14 *and Nicole Daedone.*

15 Is the Government ready?

16 MS. KASSNER: Yes.

17 THE COURT: State your appearances for the record,
18 please.

19 MS. KASSNER: Good morning, Your Honor.

20 We have a full house today. Gillian Kassner,
21 Kayla Bensing, Devon Lash, Sean Fern, and Paralegal
22 Specialist Anna November, Marlane Bosler, and Liam McNett,
23 for the Government.

24 THE COURT: Good morning, everyone.

25 THE COURTROOM DEPUTY: Are the defendants ready?

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1 MS. BONJEAN: Good morning, Your Honor.

2 Jennifer Bonjean, B-O-N-J-E-A-N, of the Bonjean
3 Law Group, on behalf of Ms. Daedone.

4 MR. ANSARI: Good morning, Your Honor.

5 Imran Ansari, A-N-S-A-R-I, for the defendant
6 Rachel Cherwitz.

7 MR. AIDALA: Good morning, Your Honor.

8 Arthur Aidala. How are you?

9 THE COURT: Good.

10 DEFENDANT CHERWITZ: Rachel Cherwitz.

11 THE COURT: Yes.

12 Good morning to all of you. Welcome to new
13 counsel. Everyone may be seated.

14 I just want to make sure, you're all at one table,
15 which is fine with me. I'm looking at the defense side
16 here. But the clients are sort of hanging off the end of
17 the table. If they're comfortable there, I'm fine with it.
18 If you want to spread out and use another table, you can do
19 that as well.

20 MS. BONJEAN: Thank you.

21 THE COURT: We're convened for a conference. I
22 will begin by taking up defendants' pending joint motion to
23 dismiss which was filed by defendants on August 1, 2024 and
24 which is opposed by the Government.

25 As the parties are aware, the motion to dismiss is

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1 the second motion seeking dismissal of the indictment. The
2 first such motion, which was brought on different grounds
3 than the instant motion, was denied on May 3, 2024.

4 I permitted the filing of the instant motion with
5 the understanding, set forth on the record at the July 3,
6 2024 conference, that the Government would be able to argue
7 that the motion should be denied for untimeliness. I am
8 prepared to give the parties my ruling on the instant motion
9 to dismiss.

10 Before I give you my ruling, I will set forth the
11 submissions that I've considered.

12 I have considered the defendants' filings at
13 ECF No. 113. There was no notice of motion, but there was a
14 memorandum of law, exhibits, and a letter regarding, inter
15 alia, sealing and redaction.

16 I note as to the filings at ECF No. 113 that
17 certain portions were redacted so that the Government Trial
18 Team did not have access to those portions but that the
19 documents in full were provided to the Government's Filter
20 Team. The Court also has the full, non-redacted versions
21 and, via the Filter Team, the Court also has the defense
22 redactions.

23 I've considered the Government's memorandum in
24 opposition to the motion to dismiss, which, along with its
25 exhibits, is at ECF No. 118.

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1 I've considered the Filter Team's supplement to
2 the Government's memorandum in opposition to the motion to
3 dismiss, which is filed at ECF No. 127 and consists of a
4 letter and three exhibits. The first two exhibits are
5 declarations, and the third exhibit is the Filter Team's
6 proposed redactions to the defense motion papers, which the
7 Filter Team believes were over-redacted by the defense. The
8 Government Trial Team does not have access to the documents
9 filed at ECF No. 127, but the defendants do.

10 I've also considered the PDF that defendants
11 contend is privileged, which has been provided to the Court
12 by the Filter Team. It consists of 27 pages. Defendants
13 have the PDF as well. The PDF was provided to the Court on
14 September 10, 2024 at the Court's direction. The cover
15 letter documenting that it was provided to the Court is
16 publicly filed at ECF No. 145. The PDF is not publicly
17 filed.

18 A note about terminology.

19 The parties refer to the 27-page PDF at issue as a
20 "document." What makes up the PDF is not one discrete
21 document, but rather multiple JPEGs provided by an
22 individual referred to as Individual 13, which were then
23 combined into one PDF by the Government for production to
24 defendants.

25 Have I correctly described the PDF, the 27-page

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1 PDF at issue?

2 MS. KASSNER: Yes, Your Honor.

3 THE COURT: Counsel for defendants, do you agree
4 with that?

5 MS. BONJEAN: I'm just a little confused. You
6 said Individual 13?

7 THE COURT: Yes.

8 MS. BONJEAN: Okay. I am doing the calculation in
9 my head of who Individual 13 is, but I think that's correct.
10 I think I understand.

11 THE COURT: Okay.

12 And counsel for Ms. Cherwitz?

13 MR. ANSARI: Yes, we join in that.

14 THE COURT: Okay.

15 Because the parties refer to the 27-page PDF as a
16 "document," I will use the parties' terminology for record
17 clarity. I will refer to the 27-page PDF as the Purportedly
18 Privileged Document.

19 I've considered the defendants' reply, which,
20 along with its exhibits, is at ECF No. 141. The exhibits
21 include two declarations and a transcript of a proceeding in
22 the Superior Court of the State of California. One of the
23 declarations has documents attached to it that are
24 referenced in the declaration. Defendants' reply addressed
25 both the Government Trial Team's opposition and the Filter

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1 Team's supplement.

2 There were also letters raised in advance of the
3 filing of the instant motion previewing the nature of the
4 motion, and, as I referenced earlier, the then-anticipated
5 motion was discussed at the July 3rd conference.

6 After defendant's reply was filed, there were
7 additional filings that raise some issues relating to
8 documents other than the Purportedly Privileged Document
9 that is the subject of the instant motion, namely certain
10 Word documents. The Word documents were provided to the
11 Court on September 23, 2024 at the Court's direction. The
12 cover letter documenting that they were provided to the
13 Court is publicly filed at ECF No. 158. The Word documents
14 are not publicly filed.

15 The issues raised about those other documents in
16 the additional filings should be addressed by the parties
17 with each other in the first instance, including, as
18 appropriate, with the Filter Team rather than the Trial
19 Team. I have considered the entirety of the record, but
20 will address only the two bases raised in the instant
21 motion, one of which relates to the Purportedly Privileged
22 Document.

23 After I give the parties my ruling on the pending
24 motion to dismiss, I will address certain other recent
25 filings by the defense in which defendants seek a variety of

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1 relief, including as to certain materials and as to schedule
2 and deadlines. Defendants raise some issues that I take
3 very seriously. But again, I'm going to be starting by
4 addressing the pending motion to dismiss.

5 Now, I don't think any of the defense counsel were
6 here then, but as I did when I ruled on the first motion to
7 dismiss brought by defendants, I will begin by briefly
8 summarizing the parties' arguments. And in the interest of
9 full disclosure, maybe not so briefly. My summaries are not
10 intended to be verbatim, except where I indicate that I am
11 quoting, or to be exhaustive. Rather, they are intended to
12 provide background and context. I have considered each of
13 the arguments made by the parties, whether I specifically
14 reference a particular argument or not.

15 The briefing is currently under seal and will
16 remain so until certain issues implicating redactions are
17 resolved. I will, however, be referencing the briefing
18 today. I will not be explicitly mentioning those parts that
19 are likely to ultimately be redacted. I note, however, that
20 defendants appear to have over-redacted their briefing.

21 Defendants argue that the indictment should be
22 dismissed for two reasons.

23 First, defendants argue that the indictment should
24 be dismissed because the Government used privileged
25 information in developing the charges, in violation of the

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1 defendants' due process rights. The document that
2 defendants point to as being privileged is the Purportedly
3 Privileged Document.

4 Second, defendants argue that the indictment
5 should be dismissed because the Government directed the
6 destruction of exculpatory evidence, namely emails of a
7 particular individual. As the parties are aware, there is a
8 separate motion pending that Judge Levy is addressing with
9 respect to the individual, and at least until that motion is
10 decided, we will not be using the individual's name.

11 In connection with their argument that the
12 indictment should be dismissed because the Government used
13 the Purportedly Privileged Document in developing the
14 charges against them, defendants argue that the document is,
15 in fact, a privileged document; that it was stolen from
16 OneTaste servers; and that there has been no waiver of
17 privilege.

18 Defendants further argue that defendants have
19 standing to assert privilege over the document.

20 Defendants argue that they have standing to assert
21 OneTaste's privilege and, in that regard, defendants make
22 certain assertions regarding defendants' roles in OneTaste
23 during a particular time frame. See ECF No. 113-1 at 4 to
24 5; see also July 3rd transcript at 18, which is ECF No. 125;
25 ECF No. 113-1 at 29, note 10; and ECF No. 141 at 13.

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1 In a footnote in their opening brief, defendants
2 indicate that they are prepared to show that they enjoyed an
3 individual privilege over the Purportedly Privileged
4 Document, but they suggest that they would have to waive
5 their Fifth Amendment privilege in order to do so and they
6 should not be required to do so. They reiterate this point
7 in their reply.

8 Defendants argue that the Government's
9 investigation went dormant for a period of time until the
10 Government obtained the Purportedly Privileged Document and
11 that the indictment would not have existed but for the
12 Government having obtained and relied on the document.

13 Defendants further argue that it is on the
14 Government now to demonstrate that the indictment resulted
15 from independent and legitimate sources.

16 Defendants argue that the government engaged in
17 wrongdoing in connection with obtaining the Purportedly
18 Privileged Document.

19 The argument that the indictment should be
20 dismissed on the basis of the use of the Purportedly
21 Privileged Document was raised by defendants with the Court
22 well after the deadline the Court had set for the filing of
23 pretrial motions, which was a date jointly proposed by the
24 parties. Indeed, the argument was raised with the Court
25 only after defendants' first motion seeking dismissal of the

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1 indictment was denied. The timing was addressed at the
2 conference on July 3rd and also in the briefing. Defendants
3 argue that their failure to raise this issue earlier should
4 be excused. They assert that the document was "buried" and
5 its nature "concealed" by the Government in its discovery
6 production. But they have also candidly stated that when
7 new counsel came into the case, they reviewed "with more
8 earnestness" the discovery material that had been produced.
9 See July 3rd transcript at 12. And they have asked the
10 Court to exercise its "discretion" to allow the motion
11 because the stakes are high. See July 3rd transcript at 9.

12 In connection with their argument that the
13 indictment should be dismissed because the Government
14 directed the destruction of exculpatory evidence, defendants
15 focus on the actions of FBI Agent McGinnis. In different
16 parts of their briefing, defendants characterize Agent
17 McGinnis's actions differently, referring, in different
18 places, to Agent McGinnis having directed, guided,
19 counseled, or advised the individual with respect to the
20 account. They also characterize differently in different
21 places what the direction, guidance, counsel, or advice was,
22 referring to disbanding and deleting the account, to
23 canceling the account, and to destroying evidence.

24 Defendants argue that the email communications had
25 apparent exculpatory value; that defendants have no ability

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1 to obtain the material elsewhere; and that the material was
2 materially exculpatory, and even if not, defendants have
3 shown that the Government acted in bad faith and that the
4 evidence is potentially useful.

5 Defendants, at various places in their briefing,
6 request a hearing, arguing that a hearing is necessary with
7 respect to such issues as the Government's receipt of the
8 Purportedly Privileged Document and the content of the email
9 account.

10 The Government opposes the instant motion in its
11 entirety. The Government argues that the instant motion
12 should be dismissed as untimely. The Government notes that
13 a pretrial motion schedule was jointly proposed by the
14 parties and adopted by the Court. The Government further
15 notes that defendants did not claim that they needed
16 additional time to review the discovery before filing
17 pretrial motions. And the Government notes that defendants
18 did not propose a different pretrial motion schedule or seek
19 an extension of the motion deadline. The Government argues
20 that defendants have not shown good cause such that their
21 failure to timely file their motion on the schedule
22 initially set by the Court for the filing of pretrial
23 motions should be excused.

24 Setting aside the issue of whether the Court
25 should reach the issues raised in the instant motion on

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1 their merits because of the timing of the motion, the
2 Government argues that dismissal of the indictment is not
3 warranted on either of the two bases advanced by defendants.

4 As to the Purportedly Privileged Document, the
5 Government argues that the document was not buried or its
6 nature concealed. Rather, the document was explicitly
7 identified in a cover letter with a description, and the
8 identity of the individual who provided the document was
9 separately disclosed to defense counsel by email.

10 The Government notes that the burden is on the
11 party asserting the attorney-client privilege to establish
12 each of its elements, and the Government argues that where a
13 corporation is a privilege holder, the corporation's current
14 management controls the attorney-client privilege; that any
15 privilege with respect to the document at issue here is held
16 exclusively by OneTaste; and that, therefore, defendants
17 lack standing to assert privilege, noting that defendants
18 are not currently employed by OneTaste in any capacity.

19 The Government argues that the cases defendants
20 rely on do not actually provide support for defendants'
21 argument that they have standing to assert OneTaste's
22 privilege.

23 The Government also argues that defendants should
24 not be given an opportunity now to try to assert an
25 individual privilege in light of the fact that they were

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1 told at the July 3rd conference that the Court wanted only
2 one motion, raising whatever the defense wanted to raise.

3 The Government further argues that, in any event,
4 because the document was disclosed in September 2023,
5 defendants have waived any privilege by failing to assert it
6 earlier.

7 On the issue of timing, the Government notes that
8 OneTaste asserted privilege over the document for the first
9 time on April 24, 2024, via email on which counsel for the
10 defendants were copied, and that counsel for the defendants
11 did not independently assert any privilege with respect to
12 the document at that time.

13 The Government also argues that defendants have
14 failed to meet their burden of establishing a factual
15 connection between the document and the charges to warrant
16 any further factual showing by the Government. In
17 connection with this argument, the Government asserts, with
18 reference to the record, that the timeline on which
19 defendants rely is inaccurate. The Government argues that
20 defendants have not established any Government misconduct
21 and argues that even if there was a violation here, the
22 remedy is exclusion of the document at trial, not dismissal
23 of the charges.

24 As to the FBI agent issue, the Government disputes
25 defendants' characterization of Agent McGinnis's conduct and

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1 points to material in the record reflecting the context and
2 content of Agent McGinnis's communication with the
3 individual at issue about the email account at issue.

4 The Government also argues that defendants have
5 failed to establish any element required for demonstrating
6 spoliation. Specifically, the Government argues that
7 defendants have failed to demonstrate that the purported
8 loss of the email account is chargeable to the Government;
9 that defendants have made no credible showing that the email
10 account possessed exculpatory value that was apparent before
11 the account was canceled; that defendants have not shown
12 that the email account is inaccessible by other means; and
13 that defendants have failed to show any bad faith.

14 The Government argues that an evidentiary hearing
15 is not warranted on defendants' motion on the record before
16 the Court because defendants have failed to create any
17 disputed issues of material fact. More specifically, the
18 Government argues, as to the privilege claim, that
19 defendants have not established standing to assert privilege
20 over the Purportedly Privileged Document or any factual
21 connection between the document and the pending criminal
22 charges to warrant a hearing. And the Government argues, as
23 to the spoliation claim, that defendants' argument turns on
24 communications that are in the record before the Court and
25 which the Court can read for itself.

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1 I will not reveal the details of the Filter Team's
2 analysis set forth in its submissions, but will state that
3 its conclusion is that on the record as it stands, the
4 burden of demonstrating that any part of the Purportedly
5 Privileged Document is privileged has not been met.

6 Further, as to two of the 27 pages, it appears that OneTaste
7 is no longer asserting privilege. The Filter Team
8 represents this and the Government notes this in its
9 opposition briefing. Of course, any conclusion by the
10 Filter Team with respect to the attorney-client privilege is
11 not binding on the court.

12 Have I accurately stated the parties' positions
13 and arguments, in general terms, of course? I don't know
14 who is going to take the lead for the Government.
15 Ms. Kassner?

16 MS. KASSNER: Yes, Your Honor.

17 And that's correct, it's correctly stated. Thank
18 you.

19 THE COURT: Okay. And again, these are just
20 summaries.

21 Counsel for Ms. Daedone?

22 MS. BONJEAN: Generally, yes, Your Honor. I don't
23 know if the Court referenced the subsequent filings of the
24 Government, the letters, and I'm sorry, I didn't write it
25 down. There was a letter filed by the Filter Team and by

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1 the Prosecution Team. I think the Court --

2 THE COURT: Yes. I think I referenced that, but
3 to the extent it wasn't clear, I considered everything
4 that's been filed and, of course, everything that has been
5 provided to the Court by the Filter Team that's not publicly
6 filed.

7 MS. BONJEAN: Okay. And I just want the Court
8 also to be clear, I know there's this 41(g) motion that's
9 also pending before the Court.

10 THE COURT: Yes.

11 MS. BONJEAN: Counsel is present here today for
12 that. He's in the gallery, Mr. Pelletier. I just wanted,
13 out of an abundance of transparency, to let the Court know
14 that he is present as well.

15 THE COURT: Yes, I recognize him. Thank you.

16 MS. BONJEAN: Okay.

17 THE COURT: Counsel for Defendant Cherwitz? And
18 again, I recognize you're new, but I know you've done your
19 due diligence and gotten up to speed on the case or you
20 wouldn't be here today. But have I accurately, in general
21 terms, stated your positions and arguments?

22 MR. ANSARI: Yes, Your Honor.

23 THE COURT: As I stated at the outset of the
24 proceeding, I am prepared to give the parties my ruling on
25 the instant motion. I'm going to address the two bases for

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1 the motion separately.

2 But as an initial matter, I note that defendants
3 have not demonstrated that they are entitled to an
4 evidentiary hearing with respect to either basis. On the
5 record before the Court, no hearing is required with respect
6 to the instant motion. The record allows for decision on
7 the instant motion without the need for a hearing.

8 Turning now to the first basis for the instant
9 motion, namely, the Purportedly Privileged Document.

10 I find that defendants have failed to demonstrate
11 good cause for their failure to bring their motion on the
12 schedule initially set by the Court and that to the extent
13 that the motion is based on the Purportedly Privileged
14 Document, the motion is subject to dismissal for
15 untimeliness.

16 By letter dated and filed November 28, 2023, the
17 parties jointly proposed a briefing schedule for pretrial
18 motions. See ECF No. 62. The same day, the Court adopted
19 that schedule. See Order dated November 28, 2023.

20 Pursuant to the schedule jointly proposed by the
21 parties and adopted by the Court, any pretrial motions were
22 required to be filed by January 16, 2024; any oppositions
23 were required to be filed by February 16, 2024; and any
24 replies were required to be filed by March 1, 2024.

25 If defendants had felt that they needed more time

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1 to go through the discovery materials or to investigate
2 before bringing their pretrial motions, they could have
3 sought an extension of the deadline for filing pretrial
4 motions. They did not do so. Rather, on January 16th,
5 defendants filed a Joint Motion to Dismiss the Indictment,
6 or, in the Alternative, for a Bill of Particulars, ECF No. 68.
7 In that motion, they challenged the indictment on several
8 grounds. The motion was fully briefed as of March 1st, oral
9 argument on the motion was heard on April 4th, and the
10 motion was denied on May 3rd. Only after the Court had
11 announced its decision on the motion -- indeed immediately
12 after -- did defendants indicate that they intended to bring
13 additional motions.

14 As is clear from the record before the Court, the
15 Government neither buried nor concealed the nature of the
16 Purportedly Privileged Document. On September 18, 2023,
17 which was approximately four months before the January 16,
18 2024 deadline set for the filing of pretrial motions, the
19 Government produced the document as part of discovery
20 production and itemized the document in a cover letter, ECF
21 No. 43. The Government also separately provided to
22 defendants the name of the person from whom the Government
23 obtained the document.

24 It appears to the Court that what happened here in
25 connection with the Purportedly Privileged Document is that

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1 defendants simply decided to try to take another bite at the
2 apple of dismissal after their first motion was
3 unsuccessful. It may be that defendants did not fully
4 appreciate the purported importance of the document at the
5 time they received it, or it may be that defendants simply
6 did not focus on the document for some period of time, for
7 whatever reason. But either way, that is not attributable
8 to the Government here.

9 It may be that new counsel decided in good faith
10 to try to raise a new basis that prior counsel chose not to
11 raise. But defendants here were represented by able counsel
12 at the time of the filing of the first motion to dismiss and
13 defendants chose to bring the motion on different grounds
14 than on the grounds of the Purportedly Privileged Document.
15 A change in counsel does not give a criminal defendant a
16 restart or redo of the proceedings. Defendants appear to
17 implicitly recognize this, as evidenced by their asking the
18 Court at the July 3rd conference to exercise its discretion
19 and allow the late filing of the motion.

20 To the extent that the motion to dismiss is based
21 on the Purportedly Privileged Document, the motion is denied
22 as untimely.

23 Notwithstanding that denial for untimeliness is
24 proper here, I have nevertheless, out of an abundance of
25 caution, considered the first basis for the motion on its

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1 merits and do not find that defendants have met their burden
2 of demonstrating that the extraordinary remedy of dismissal
3 of the indictment would be warranted even if defendants had
4 timely raised that basis.

5 The Second Circuit has stated that dismissal of an
6 indictment is an extraordinary remedy reserved only for
7 extremely limited circumstances implicating fundamental
8 rights. See *United States versus De La Pava*, 268 F.3d 157
9 at 165, Second Circuit 2001. No such circumstances exist
10 here.

11 Defendants have not established that the
12 Purportedly Privileged Document is a privileged
13 communication. As the Second Circuit has stated: "The
14 attorney-client privilege protects communications (1)
15 between a client and his or her attorney (2) that are
16 intended to be, and in fact were, kept confidential (3) for
17 the purpose of obtaining or providing legal advice" and the
18 party asserting the privilege "bears the burden of
19 establishing its essential elements." See *United States*
20 *versus Mejia*, 655 F.3d 126 at 132, Second Circuit 2011.

21 Although, as defendants note, some of the pages of
22 the document have markings referencing in full or in part
23 the words "attorney client privilege," that is not
24 dispositive, and particularly so in light of other
25 information in the record before the Court.

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1 Defendants assert that there was a particular
2 document that was provided to, and created at the request
3 of, DGG, to facilitate DGG's provision of legal advice, and
4 defendants assert that that document is privileged. And DGG
5 stands for Davis Goldberg & Galper, PLLC. But defendants
6 have failed to demonstrate that the Purportedly Privileged
7 Document is the document they assert was provided to DGG.

8 Indeed, the evidence before the Court, including
9 evidence relating to chronology and content, reflects that
10 the Purportedly Privileged Document is not the document that
11 defendants assert was provided to DGG. See, e.g., ECF
12 No. 127-1 at paragraphs 12 through 14. And, as noted earlier,
13 OneTaste has acknowledged that two pages of the Purportedly
14 Privileged Document are, in fact, not privileged.

15 Because defendants have not shown that the
16 Purportedly Privileged Document is the document that they
17 assert was provided to DGG, defendants have not shown that
18 the Purportedly Privileged Document was a communication to
19 DGG.

20 Even were the Court to have concluded that the
21 Purportedly Privileged Document is the document that
22 defendants assert was provided to DGG, defendants have not
23 established all of the elements of the attorney-client
24 privilege. For example, defendants have not met their
25 burden of establishing that the document constituted a

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1 communication between a client and the client's attorney.
2 Defendants have not established who authored and/or provided
3 the document to DGG. In addition, evidence suggests that at
4 least some portions of the document were created prior to
5 DGG being retained by OneTaste. Further, defendants have
6 not met their burden of establishing that the document was
7 intended to be and was in fact kept confidential.

8 And in any event, on the facts before the Court,
9 any purported privilege belongs to OneTaste, the
10 corporation, not to the defendants individually, and
11 defendants cannot avail themselves of any privilege held by
12 OneTaste. As courts have recognized, generally when an
13 attorney is employed or retained as a company's lawyer, any
14 privilege that attaches to communications on corporate
15 matters between corporate employees and corporate counsel
16 belongs to the corporation, not to the individual employee,
17 and the employee may not avail herself of the corporation's
18 privilege. See *United States versus International*
19 *Brotherhood of Teamsters*, 119 F.3d 210 at 215, Second
20 Circuit 1997; *United States versus Piccini*, 412 F.2d 591 at
21 593, Second Circuit 1969; *Application of Sarrio, S.A.*,
22 119 F.3d 143 at 147 to 48, Second Circuit 1997; and *United*
23 *States versus Gentile*, number 21-CR-54, 2024 Westlaw 3343983
24 at 3, Eastern District of New York, July 8, 2024.

25 Notably, defendants have not even shown that they

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1 have the authority to assert any purported privilege held by
2 OneTaste. As courts have recognized, when a corporation is
3 solvent, the agent that controls the corporate
4 attorney-client privilege is the corporation's management,
5 and when control of a corporation passes to new management,
6 the authority to assert and waive the corporation's
7 attorney-client privilege passes as well. See *Commodity*
8 *Futures Trading Commission versus Weintraub*, 471 U.S. 343 at
9 349 and 356, 1985. See also *Ambrose versus City of White*
10 *Plains*, number 10-CV-4946, 2011 Westlaw 13290651, at 10,
11 Southern District of New York, September 30, 2011.

12 Further, although an employee of a corporation can
13 under certain circumstances enjoy a personal attorney-client
14 relationship with counsel for the corporation, in order to
15 be able to assert an individual privilege over
16 communications with counsel for the corporation, the
17 employee must make a showing that defendants here have not
18 made. See *Gentile*, 2024 Westlaw 3343983, at 3. And
19 *Teamsters* 119 F.3d, at 215. Indeed, defendants have made
20 clear that they have not attempted to demonstrate that they
21 have an individual privilege. See ECF No. 113-1, at 29,
22 note 10.

23 The Court was clear at the July 3rd conference
24 that defendants needed to bring one motion raising whatever
25 the defendants wanted to raise and that there would not be

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1 waves of motions. Defendants' suggestion that they have
2 more they could demonstrate is unavailing at this stage.

3 On the issue of privilege, the caselaw cited by
4 defendants is unavailing in light of the specific facts and
5 relevant relationships here.

6 The Court has further concluded that even if the
7 Purportedly Privileged Document were privileged and even if
8 defendants had the authority to assert any privilege,
9 neither of which they have established, defendants have
10 waived their right to do so by having waited so long to
11 assert privilege. They had the Purportedly Privileged
12 Document in September 2023 and did not raise any privilege
13 claim until more than seven months later. See, e.g., *United*
14 *States versus Schulte*, No. 17-CR-548, 2022 Westlaw 1284549,
15 at 2, Southern District of New York, April 29, 2022; and
16 *United States versus Watson*, No. 23-CR-82, 2024 Westlaw
17 3202765, at 7 to 8, Eastern District of New York, June 27,
18 2024; see also *Teamsters*, 119 F.3d at 214.

19 In addition, defendants' argument that the
20 indictment would not exist but for the use of the
21 Purportedly Privileged Document by the Government is not
22 supported by the record.

23 Finally, with respect to the Purportedly
24 Privileged Document, even were the Court to have concluded
25 that there was a violation by the Government here warranting

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1 a remedy, the extraordinary remedy of dismissal of the
2 indictment, which is the remedy sought by defendants, would
3 not be the appropriate remedy. At most, the Court would
4 preclude the Government from using the document at trial,
5 either in its case in chief or for any purpose at all.

6 Turning to the second basis for the instant
7 motion, relating to the FBI agent and the email account,
8 defendants' arguments are unavailing. Indeed, defendants'
9 strained reading of the relevant communications, and
10 defendants' evident disregard of relevant context, renders
11 their arguments particularly unavailing.

12 As I referenced earlier when summarizing the
13 defendants' arguments, defendants describe the actions of
14 the agent differently in different places in their brief.
15 Notwithstanding anyone's characterizations of the
16 communications, it is clear to the Court on the record
17 before it that the agent did not direct the individual at
18 issue to destroy her emails. What he actually said to her,
19 and the inquiry from her that he was responding to, in
20 context, paint a very different picture than the one
21 defendants paint. Those communications are in the record.

22 To prevail on a spoliation claim, a defendant must
23 show: one, that the evidence possessed exculpatory value
24 that was apparent before it was destroyed; two, that the
25 evidence was of such a nature that the defendant would be

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1 unable to obtain comparable evidence by other reasonably
2 available means; and three, bad faith on the part of the
3 government. See *United States versus Walker*, 974 F.3d 193,
4 at 208, Second Circuit 2020. As a threshold matter,
5 however, a defendant must first show that evidence has been
6 lost and that this loss is chargeable to the Government.
7 See *United States versus Greenberg*, 835 F.3d 295, at 303,
8 Second Circuit 2016.

9 Defendants do not come close to meeting their
10 burden of demonstrating spoliation on the record here. In
11 addition to failing to establish that any purported loss
12 with respect to the email account is chargeable to the
13 Government, defendants have failed to demonstrate that the
14 email account possessed exculpatory value that was apparent
15 before the account was canceled; have failed to demonstrate
16 that the contents of the account are inaccessible to
17 defendants or that defendants are unable to obtain
18 comparable evidence by other reasonably available means; and
19 have failed to demonstrate bad faith on the part of the
20 government.

21 Finally, even were the Court to have concluded
22 that with respect to the email account there was a violation
23 by the Government here warranting a remedy, the
24 extraordinary remedy of dismissal of the indictment, which,
25 again, is the remedy sought by defendants, would not be the

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1 appropriate remedy.

2 Defendants' motion to dismiss, ECF No. 113, is
3 denied in its entirety.

4 And that concludes my ruling.

5 Turning now to other matters, I want to advise the
6 parties that I take accusations of misconduct very
7 seriously. A party making such an accusation should take
8 care to be on solid factual ground before doing so. I also
9 take very seriously compliance with discovery and Brady
10 obligations.

11 Across two submissions recently filed, including
12 the one that was filed at I think 11:34 last night,
13 defendants seek a variety of relief. One request was
14 already denied by the Court. As for the other requests,
15 defendants seek a deadline for expert disclosure. The
16 deadline for expert disclosure is October 4, 2024.

17 Defendants seek to have the Court order the
18 Government to make more fulsome and complete production of
19 Brady material, including all unredacted 302 Reports of
20 witnesses previously identified as having provided
21 potentially exculpatory information. Defendants seek to
22 have the Court order the Government to make disclosures
23 related to the journals, as detailed in defendants' letter
24 to the Government dated September 23, 2024. I think
25 everyone knows which journals I'm talking about. Defendants

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1 seek also to have the Court urge the Government to make more
2 expedited disclosure of 3500 material.

3 Let me ask defense counsel, as far as those
4 requests, have I accurately stated what you at this time are
5 asking for based on your last two submissions?

6 Counsel for Ms. Daedone?

7 MS. BONJEAN: Yes, Judge, that was what was
8 detailed in our letter last night.

9 THE COURT: And also the letter from a couple days
10 ago, correct? The letter where you asked for an adjournment
11 of trial, which was denied. There were other requests as
12 well.

13 MS. BONJEAN: Yes. Mr. Ansari, I think, filed
14 that letter.

15 THE COURT: But that was for both of you, correct?

16 MR. ANSARI: Yes, Your Honor.

17 THE COURT: And now let me ask counsel for
18 Ms. Cherwitz, have I stated what it is that are your
19 outstanding requests?

20 MR. ANSARI: Yes, Your Honor.

21 THE COURT: So one of the filings came late
22 yesterday. The Court has had a chance to thoroughly review
23 it. I don't know whether the Government has, but I
24 certainly know that the Government did not have sufficient
25 time to respond to it if they wanted to respond to it.

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1 So let me ask you now, Ms. Kassner or whoever is
2 going to be speaking on behalf of the Government, do you
3 wish to be heard with respect to those requests? And again,
4 they're all relating to the upcoming trial. Do you want to
5 respond now? Do you want to respond in writing? I think
6 some of them you can probably respond to now, but I leave
7 that to you to let me know.

8 MS. KASSNER: Yes, Your Honor, very briefly.

9 We received and reviewed the letter, but have
10 not -- you know, it's a quite lengthy letter and we have not
11 had an opportunity to dig into every request. But I think
12 the overarching request is that we turn over 3500 material
13 for every witness that we identified in previous disclosures
14 to defense, and we just don't think that's appropriate --

15 THE COURT: Well, it's a bit more than that.

16 MS. KASSNER: Yes. But I want to address just
17 that first request that I'm prepared to do today.

18 THE COURT: Okay. Go ahead.

19 MS. KASSNER: We put them on notice of who all
20 these individuals are throughout the, you know, production
21 of discovery in this case. We've produced all the materials
22 that witnesses who have spoken with us have provided to us
23 on a rolling basis. We've identified these individuals by
24 name. In other court appearances we've actually been --
25 there have been statements that are letters disclosing such

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1 materials that were quite voluminous and long. We make them
2 on a regular basis. So to the extent that there's a request
3 to produce all 3500 we have for people that we've already
4 identified to them, people that they're already on notice of
5 as having potentially helpful information to the defense, we
6 think that's not appropriate.

7 As to the other request in the letter --

8 THE COURT: What is your concern -- and, of
9 course, I appreciate the defense being very up front and
10 acknowledging that the Court cannot order you to produce
11 3500 material on a particular date because, of course, that
12 is a statutory provision and the statute says what it says.

13 But as a practical matter, there is a trial coming
14 up, and I take very seriously the defense's right to prepare
15 their defense and they need to have materials in a time
16 frame where they can use them.

17 MS. KASSNER: Yes, Your Honor.

18 So there are two concerns. First of all, the
19 Government also takes very seriously the provision of any
20 material that would be helpful to the defense, and we take
21 our disclosure and discovery obligations seriously.

22 That said, we have a very equally significant
23 concern in this particular case about witness intimidation
24 and retaliation. We've submitted a letter on the topic
25 generally. There are currently a variety of examples of

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1 instances where people we've identified in our disclosure
2 letters have subsequently been the subject of public posts
3 that are very damaging to them, and we are very concerned
4 about the progress of those posts. And we're aware of at
5 least -- you know, there are public filings that name
6 witnesses that have very personal information that is being
7 published, including where they work, their full name --

8 THE COURT: You're mentioning public filings, and
9 I'm not sure where you mean they're filed.

10 MS. KASSNER: Sorry. Public posts. So we're
11 aware of at least -- and we wrote to Your Honor about this,
12 but there is a blog called the Frank Report. The individual
13 who posts on that blog has publicly stated on the blog that
14 OneTaste hired him or retained him. There is a concern that
15 OneTaste is providing information to somebody who has a
16 blog, and thereby the result is that people we're
17 identifying in discovery as potential witnesses in this case
18 are waking up and seeing that posted online for everyone to
19 see is very personal, very damaging information that
20 identifies them, their full names, in some cases they've
21 remarried and it has their new name, it identifies their
22 workplaces, it accuses them of a variety of things,
23 including attacks on their credibility and character.

24 We're monitoring it. We think it's a very serious
25 concern. We have not raised it to Your Honor in full yet.

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1 We previewed it to Your Honor because we think there have
2 been violations of the protective order in this case.

3 We will tell you that before producing 3500 in
4 this case, we do plan to submit a protective order that will
5 restrict OneTaste's access to these materials and limit it
6 to defense counsel, and we've sought, as a remedy to some of
7 it, a restriction on OneTaste's access to the materials
8 because it does appear OneTaste has hired -- or at least
9 paid the person who is posting some of this material.

10 THE COURT: Okay.

11 Do you want to respond on the Brady issue that has
12 been raised in the submissions of the defendants?

13 MS. BENSING: Your Honor, Kayla Bensing for the
14 Government. I think what Your Honor is discussing is the
15 letter of yesterday about the journal.

16 THE COURT: Well, actually I'm talking even more
17 generally, and that may be part of the issue with the
18 request, which is to -- I'm quoting -- make more fulsome and
19 complete production of Brady material. I mean, Brady
20 material has to be produced, right? So I'm not really sure
21 what the request about "more fulsome," right? It's either
22 Brady or it's not Brady.

23 MS. BENSING: Your Honor, perhaps what I can do is
24 describe what the Government has done, because I'm not sure
25 that the Court has a copy of these letters that, which can

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1 provide to the Court under seal. They do reference central
2 Government witnesses.

3 So what the Government has done is on a rolling
4 basis, as interviews have been conducted with potential
5 witnesses in the case, the Government has outlined
6 statements from those interviews that may be helpful to the
7 defense. We've taken a very broad view of statements that
8 may be helpful to the defense. We've outlined those in
9 very --

10 THE COURT: When you say "outlined," what do you
11 mean?

12 MS. BENSING: So, for example, Witness 1 has
13 informed the Government that Witness 1 was paid during their
14 time at OneTaste. That's just --

15 THE COURT: So you're not producing reports that
16 are redacted. You're just summarizing or maybe even
17 quoting, but you're taking from what was told and you're
18 putting it into something else and then you're producing it.

19 MS. BENSING: Correct, Your Honor.

20 THE COURT: Okay.

21 MS. BENSING: I think we have less of an objection
22 to providing these agent reports of the witness interviews
23 to the Court, if the Court wants to conduct an in camera
24 review if there's some kind of question about the nature of
25 the disclosures --

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1 THE COURT: I don't think at this stage I do. You
2 know, the Government makes Brady determinations, and the
3 Government has to live with the consequences of the
4 determination it makes if it comes too close to the line.

5 MS. BENSING: Your Honor, so that's what we have
6 done. So I think in terms of the request for more fulsome
7 disclosure, it seems that what is being requested is
8 production of what we call the 302 Reports that the FBI
9 agents have created. So it seems what they're requesting is
10 just disclosure of these 302 Reports for the witness whom
11 the Government has identified in these letters.

12 But because of the nature of this case and because
13 of the sheer length of time that some of the witnesses were
14 involved in OneTaste and their experiences there, the
15 individuals who we've identified in these letters do
16 constitute many, many individuals. And so essentially
17 producing these 302s would constitute a production of early
18 3500 material. I will say --

19 THE COURT: Are we still talking about the 77
20 witnesses, or has the number grown since that time?

21 MS. BENSING: I think it's grown. I just hesitate
22 because as we maybe interview somebody and learn additional
23 information that could be potentially helpful, we then
24 include. So we continue to make these on a rolling basis,
25 but some may be repeat individuals who we've previously made

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1 disclosures about.

2 THE COURT: Okay.

3 MS. BENSING: And I guess I will say, you know,
4 obviously we can't anticipate every defense. And so when
5 the 3500 material is produced, it's obviously possible that
6 the defense may identify something that we didn't perceive
7 to be Brady material. We are mindful of that. And so we do
8 plan to disclose 3500 early in this case, as we've
9 previously represented to the Court on numerous occasions.
10 We've been reaching out for weeks to agree on a deadline for
11 the production of 3500 material that would also constitute a
12 joint production of 26.2 material by the defense that we
13 have been unable to --

14 THE COURT: What do you think you're going to get
15 from the defense at this stage when they don't have any
16 obligation to put on a case? I mean, I understand what the
17 rule requires, but you have quite a large volume of 3500
18 material.

19 MS. KASSNER: Your Honor, this case is quite
20 unusual in the sense that we're aware that OneTaste -- their
21 attorneys, first of all, have held themselves out to be
22 members of the defense team, and we are aware that OneTaste
23 has gone out and interviewed quite a substantial number of
24 people who they have, at various times, told us might be
25 potential witnesses in this case, and they've included some

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1 text messages from those individuals in the court filings
2 and in their submissions to us. We're aware that there are
3 recorded interviews that are hours long with dozens of
4 people, and it's in their possession. So to the extent that
5 they are aware that they are likely to call those people as
6 witnesses, we would ask for a deadline that's mutual because
7 this is quite voluminous material.

8 THE COURT: But again, I mean, the rule says what
9 it says, right? So --

10 MS. KASSNER: Well, Your Honor --

11 THE COURT: You're talking about agreeing with
12 each other.

13 MS. KASSNER: Yes, Your Honor. And to be clear,
14 it's 3500 and 26.2 materials. You can agree on a joint --

15 THE COURT: The parties can agree, for sure.

16 MS. KASSNER: Yes.

17 THE COURT: But I guess I don't hear you to be
18 saying the Court should order a date. Do you think the
19 Court has the authority to do that?

20 MS. KASSNER: I think as part of the Court's
21 authority to manage a trial, it can impose a deadline in the
22 sense that courts have issued disclosure deadlines for 3500.
23 It's a similar issue. We could pause the trial right after
24 they testify and then --

25 THE COURT: That's why parties usually work it

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1 out, right?

2 MS. KASSNER: Yes. Their indication that they
3 have a two-week defense, Your Honor, suggests to us that
4 they have quite a few witnesses that they've identified, and
5 the concern the Government has is the volume of material for
6 some of these individuals who were potentially people who
7 were at OneTaste for over a decade who have untellable
8 numbers of emails that are relevant here and who have
9 potentially interviews that are hours long that are
10 recorded, we might have to stop the trial after every
11 defense witness if we don't agree in advance.

12 THE COURT: Right. Which is not workable.

13 I don't get the sense, and this is going to come
14 as a surprise to absolutely no one, that the parties are
15 particularly getting along with each other. At least that's
16 what's sort of suggested by the tone of some of the filings,
17 particularly on the defense side, frankly.

18 I would encourage the parties to have some more
19 conversations with each other. I do take very seriously
20 what the Government is saying about conduct with respect to
21 its potential witnesses. But I also take very seriously the
22 defense's right to investigate and to prepare its defense.
23 I think the parties can work together better and in a more
24 efficient way without anybody giving up their client's best
25 interest.

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1 MS. BONJEAN: Judge, if I just may, I want to be
2 very clear about the Brady material we were seeking and the
3 way it's been produced.

4 THE COURT: Please.

5 MS. BONJEAN: It has been produced in this very
6 chopped fashion and categorized, it's been culled, it's
7 been -- I don't even know if it's verbatim. With all due
8 respect to the Government, I don't know what position they
9 are in to really -- you know, deciding what is Brady. Also,
10 it could be potentially misleading to pull something out of
11 a larger statement. I mean, these are long statements and
12 they're pulling out one line, and I don't know if it's -- I
13 mean, it's hard to assess. I don't think it's really the
14 Government's job to be assessing that. If there's something
15 potentially exculpatory, they should give us the entire
16 statement and --

17 THE COURT: I'm not sure the law is on your side
18 on that. Certainly they shouldn't be giving things that are
19 misleading or so out of context. But in the first instance,
20 the Government does have to make some judgment calls. But
21 again, they run the risk of if they cut it too close to the
22 line, that could be very problematic for them.

23 MS. BONJEAN: Right. And I understand, but I
24 think Brady trumps 3500. I just am -- I'm just -- I can't
25 accept the Government's position that they have established

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1 their Brady obligations. And I want to give the Court one
2 example.

3 THE COURT: Please.

4 MS. BONJEAN: And I take this serious, as well.
5 We, for instance -- and this kind of goes into the journal
6 issue, but --

7 THE COURT: Go ahead. That's fine.

8 MS. BONJEAN: We were provided typewritten journal
9 entries that were purportedly written by an individual, and
10 they were, I would say, supportive of the Government's
11 theory of the case. It was 25 pages. Those were provided
12 very -- I wouldn't say very, but earlier on in the
13 production. And then very, very recently, within the last
14 few months we were provided with these handwritten journals
15 which was much more voluminous, the lion's share of which I
16 would consider as a defense attorney is Brady because it
17 goes to the credibility of the one person that they allege
18 and have publicly stated is going to be one of their
19 witnesses, victim witnesses. That, to me, is Brady. I
20 don't know that they see that as Brady. But it was only
21 recently produced.

22 In this Court's own order, I think Brady is
23 supposed to be produced when it is available. When they
24 first learn of it, it's supposed to be promptly produced.
25 So we get 190 pages of handwritten journal that, from our

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1 perspective, contains significant Brady material because it
2 goes to the credibility, the veracity of this particular
3 witness's account, which we don't know what she has told the
4 Government, but we do know what she has publicly stated in
5 films and in other media sources.

6 So that's an example of where we don't see eye to
7 eye on what constitutes Brady, I think, which is no
8 surprise. And I'm not saying that -- again, I don't want to
9 be -- I don't want to overstate it, but it was concerning to
10 see that. So that's one example. The timeline isn't just,
11 well, 3500 material timeline. It's a Brady timeline.

12 THE COURT: No, I understand the distinction
13 clearly and I understand that you're making the distinction.

14 MS. BONJEAN: Yes.

15 THE COURT: And I would hope that the Government
16 understands the distinction, and I think they do.

17 Do you want to comment on the Government's --

18 MS. BONJEAN: Concerns?

19 THE COURT: Concerns, yes.

20 MS. BONJEAN: So these are concerns that I do not
21 think are based on any facts. I mean, they have suggested
22 some type of violation of a protective order, and I know
23 that issue is before the Magistrate Judge. But I've not --
24 I've not seen it. If there's information out there, whether
25 it's this Frank Report or anywhere else, it is not coming

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1 from privileged -- I'm sorry, protected material. I've not
2 heard them identify a single instance where anything has
3 been shared -- that they believe has been shared. There's a
4 lot of hypotheses.

5 THE COURT: Let me just stop you, and I'll let you
6 continue, but I want to make sure I'm understanding what you
7 just said properly.

8 Your representation is that as far as you know,
9 based on what you've seen, that the information that the
10 Government's concerned about, for instance, on the Frank
11 Report that they just referenced, is not information that
12 came from material produced pursuant to the protective
13 order.

14 MS. BONJEAN: That is absolutely my belief and my
15 representation. And the Government can tell you that I
16 called them up when I came on to the case, I said I want
17 to -- the protective order is a little confusing to me and I
18 want to make sure that I am understanding what your
19 perception is of it. I know what I am personally doing as a
20 lawyer, and I know what prior counsel, Mr. Duncan Levin, was
21 doing, and I know my colleagues here are new to the case. I
22 can't speak for prior counsel that came into this case
23 before my involvement. But this is how I read it. I want
24 to get on the same page so we have no misunderstandings. I
25 think we did that. And I still do not see anything in their

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1 filings that would suggest that there was a violation of a
2 protective order.

3 So from where I sit, if something is in the public
4 domain, I don't know how I can deal with that and why we
5 would be responsible for that. This is information that is
6 in the public domain. That's how these things work.

7 THE COURT: Well, I think there's two separate
8 issues, right? There's the issue of whether there's a
9 violation of the protective order, and Judge Levy is dealing
10 with that. But there's the separate issue of just, in
11 general, conduct toward potential witnesses, right? I think
12 I understood the Government to be saying that the
13 information that they're concerned about is information that
14 they're producing pursuant to a protective order that's
15 being misused to intimidate, harass, whatever word you want
16 to use, potential witnesses.

17 Let me turn back to the Government. Do I have
18 your argument?

19 MS. KASSNER: Yes, Your Honor.

20 I think there are two separate concerns, but I'll
21 start with the very specific question, which is: Have we
22 alleged that the protective order was violated and that
23 there are specific materials we've produced in discovery
24 that were used for purposes other than defending -- the
25 defendants' defense in this case, and the answer is yes. We

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1 filed a letter on August 15, 2024 about this.

2 I will note for the record that we have not
3 alleged, accused, otherwise made any statements about
4 counsel in this case in connection with that. Our
5 concerns --

6 THE COURT: Oh, I know what you've alleged and
7 haven't alleged. That is worth highlighting.

8 MS. KASSNER: Our concern is about counsel for
9 OneTaste, who we believe, and we set this out in a letter,
10 used what we've been referring to as the Potentially
11 Privileged Document today to threaten legal action against
12 three different former people who had participated in
13 OneTaste. Threatening legal action against witnesses in
14 connection with materials that we produced in discovery we
15 believe is a violation of the protective order. They didn't
16 ask us in advance if they could disclose those or use the
17 materials. They didn't seek the Court's permission for that
18 use, even though they may argue that they had a reason for
19 it, that the protective order requires that that be brought
20 to our attention and the Court's attention so that we can
21 address it.

22 And so that's one example where we have pointed to
23 a document produced in discovery that led to action taken
24 against three people who are potential witnesses in this
25 case.

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1 You know, more broadly speaking, we think that
2 there's a bigger issue, which is identification of
3 particular witness statements in discovery may lead to
4 witness intimidation or retaliation, but it is not
5 necessarily reliant on use of materials that we give because
6 as everyone -- as Your Honor is certainly aware, the
7 individuals who are potential witnesses in this case have
8 already independently disclosed a lot of material to
9 OneTaste that is very damaging. Therefore, they could find
10 out that someone is a potential witness in the case through
11 our disclosures, find out what they intend to say, and then
12 find other sources of materials to intimidate them, harass
13 them, retaliate them. And it could be OneTaste's counsel
14 that is doing that, or OneTaste the company, seeing as they
15 have hired the person who is writing this damaging material
16 online.

17 So it's a separate concern, but it's a related
18 concern which has complicated our ability to provide or
19 agree to provide some of this information until we can
20 narrow down a pretty restrictive protective order.

21 THE COURT: Have those discussions started?

22 MS. KASSNER: Your Honor, I think we've began
23 them, but we were at first told that there was a request for
24 immediate disclosure. So I think that after today, we are
25 very happy to sit down with defense counsel and try to work

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1 this out because I do think it's something that we should
2 work out if we can.

3 THE COURT: If you didn't have a concern about
4 potential intimidation, would you produce the 3500 material
5 earlier?

6 MS. KASSNER: Your Honor, as a matter of policy,
7 we generally -- 60 days in advance of trial is --

8 THE COURT: But policy -- I mean, every case
9 stands on its own, right? I understand you may have some
10 policies, but I think everybody acknowledges this is a
11 unique case. I mean, every case is really unique, but there
12 are some issues here which aren't the norm for cases.

13 MS. KASSNER: So truthfully, Your Honor, I think
14 there's a chance we might if we didn't have that concern,
15 but that concern is so -- it's been weighing on our
16 consideration.

17 THE COURT: I understand.

18 MS. KASSNER: But I will also note just as a
19 reminder, we have committed not just to providing the 302s
20 or FBI reports for the witnesses who were interviewed by the
21 FBI who we intend to call as witnesses, but everyone --

22 THE COURT: I remember Ms. Elbert made that
23 representation.

24 MS. KASSNER: We intend to make a very fulsome
25 production. And if we can agree on a mutual date, I believe

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1 we can probably find a way to move the date up, but I think
2 we need to sit down and have that conversation.

3 THE COURT: Let me just cut to the chase on this.
4 It sounds like what your concern is, is that OneTaste,
5 either on its own or at the behest of the defendants, is
6 trying to intimidate witnesses. Is that what your concern is?

7 MS. KASSNER: Yes, that is our concern, Your Honor.

8 THE COURT: Well --

9 MS. BONJEAN: Obviously we vehemently object to
10 that characterization.

11 THE COURT: I imagine you would, yes.

12 MS. BONJEAN: It's very speculative. We haven't
13 heard anything specific about this. What we hear is that
14 people are -- as witnesses often tend to be, are upset that
15 they're perhaps the subject of some criticism. Yes, this is
16 not --

17 You have to remember, Your Honor, this was brought
18 into the media not by OneTaste or the defendants. There's
19 been a long history of media coverage of this case, if you
20 will. There was a Netflix documentary. These individuals
21 put themselves into the spotlight and now they want to take
22 themselves out. And I understand that, but that is not --
23 you know, that is not to say that these individuals have
24 played any role in harassing them. Not wanting to be in the
25 spotlight at this point and to remove yourself from it after

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1 you put yourself is not really being intimidated. That is,
2 you know, maybe you don't like what you yourself created in
3 some way.

4 I would also point out that OneTaste counsel
5 asserting a privilege to a stolen document -- and this is
6 separate and apart from this Court's ruling today about the
7 document -- OneTaste maintains, as is their right, that this
8 was a stolen document that was a privileged document. They
9 have the right to not certainly threaten anybody, but to
10 assert their legal remedies in connection with that. That
11 is not necessarily -- they don't have to go through the
12 Government to do that. The Government doesn't -- frankly,
13 with all due respect, they aren't the bosses of everyone.
14 Private counsel for OneTaste, so long as they are not
15 crossing any ethical lines, has the right to assert
16 OneTaste's interest. In fact, they have a duty to do so.

17 And so I take a little bit of offense to this idea
18 that this was somehow done to intimidate witnesses. I can't
19 speak for OneTaste counsel, I am not OneTaste counsel, but
20 that's a big leap to say that because they are reaching out
21 to people and saying, hey, we want our document back that
22 you stole from us, that that in and of itself is an act of
23 harassment. We reject that argument.

24 THE COURT: I think it's very clear the different
25 parties' arguments. But these are the arguments and this is

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1 what is the Government's concern, as they've expressed it,
2 is what's preventing them from -- one of the things, I
3 guess, preventing them from giving you materials earlier.
4 We're talking there about 3500 material, not Brady. I don't
5 think I'm hearing from the Government that they think that
6 they can hold back Brady. I'm not hearing that. The
7 Government knows that it has to provide Brady.

8 But, Ms. Bonjean, you made the point that you view
9 certain materials you've gotten differently than the
10 Government. You think certain things are Brady. I think
11 you need to have those conversations with the Government if
12 you haven't already.

13 Go ahead, Ms. Bensing.

14 MS. BENSING: Your Honor, I was just going to note
15 that the one example that Ms. Bonjean highlighted, the
16 Government produced those materials and produced them months
17 in advance of trial. And so to the extent that there is
18 some kind of additional material or issues that they're
19 looking for, we're happy to speak to them about that.

20 THE COURT: That's helpful.

21 Let me ask you about that. The example she gave
22 about what she considered to be Brady material that I guess
23 prior you had not considered -- which is fine, this is how
24 it works, right? The defense comes to you and you have
25 given some information --

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1 MS. BENSING: Can I make a factual clarification?

2 THE COURT: Go ahead.

3 MS. BENSING: We've been producing things on a
4 rolling basis as we've received them. We've produced
5 journals earlier on in the case. We received additional
6 material and we've produced it in discovery. So I'm not
7 sure that we are taking a different view. We've been
8 producing things --

9 THE COURT: But I think that's the problem here.
10 It's not a matter of you get a new statement and you're
11 producing it. I think what Ms. Bonjean is saying is that
12 substantively they think certain information, a certain type
13 of information is Brady, and maybe the Government doesn't
14 think that.

15 Am I accurately characterizing what you've said,
16 Ms. Bonjean?

17 MS. BONJEAN: Yes, Judge, I think that's accurate.
18 The example I used was these handwritten journals that we
19 believe the Government should have produced long ago. It's
20 the timing issue.

21 Now, and I think this came up in our papers, there
22 was some concerns, and this has been raised and the
23 transcripts, I think, show this, there may be on the part of
24 Agent McGinnis -- you know, the reason it was a late
25 disclosure is because Ms. -- the witness at issue here did

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1 not want to have to produce them in another litigation, and
2 then McGinnis said, well, give them to me, you can't produce
3 what you don't have, and then all of a sudden we get them.
4 There's just a lot of -- you know, some trouble I see where
5 they're game playing.

6 We just a couple weeks ago got a whole -- I don't
7 even know, maybe it was one week ago, got an entire jump
8 drive of other materials that I would consider largely
9 exculpatory of this one witness. A whole jump drive of
10 material. Why are we getting them now? The Government is
11 saying, we didn't have them. I think maybe that's what
12 they're saying; I don't know if that's what they're saying.

13 Again, there's a lot of examples of material,
14 including stuff we just got last week, or a week ago or so,
15 that we believe is Brady.

16 Imran, I'm sorry.

17 MR. ANSARI: Judge, Ms. Bonjean is hitting the
18 points.

19 THE COURT: Go ahead.

20 MR. ANSARI: I do need to point out one thing
21 about some of this material being held back about what I
22 would think would be completely speculative witness
23 intimidation. It's one thing to have some concrete evidence
24 of that that could be attributed to my client or
25 Ms. Bonjean's client, but I don't think we have anything

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1 related to that.

2 So my understanding, what I hear now is that a lot
3 of this material is being withheld or stalled or they're
4 falling back on the statutory aspect of things because
5 there's a fear that there's going to be some witness
6 intimidation, but there's nothing concrete --

7 THE COURT: I don't think that's quite what
8 they're saying. I think as to Brady, I think they're saying
9 they're in compliance, that they think they're in compliance
10 and they're producing material as they get it.

11 But what I think they were talking about with 3500
12 material, they're reluctant to produce it any earlier than
13 the 60 days that they have already said they will produce it
14 because they have these concerns about witness intimidation.
15 I think that's what the Government is saying.

16 Is that correct?

17 MS. BENSING: That's correct, Your Honor.

18 And we disagree with some of the characterizations,
19 which I can get into if the Court would like.

20 THE COURT: Not at this time. Thank you.

21 Go ahead, though, if you have more to say.

22 MR. ANSARI: But again, Your Honor, there's
23 nothing to attribute that whatsoever to these defendants.
24 You know, we're in disagreement. I mean, if there's a --

25 THE COURT: Okay. I hear everybody. I think you

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1 need to talk to each other because I do think that the
2 Government needs to listen to the defense about what types
3 of things the defense thinks are exculpatory and material to
4 their defense.

5 MS. BENSING: Understood, Your Honor. We have been
6 and will continue to try to engage in those conversations.

7 THE COURT: Is the line of communication clear? I
8 mean, there's a lot of people on this side, a lot of
9 Government lawyers here. Do you have an efficient way of
10 communicating with each other?

11 MS. BENSING: From the Government's perspective,
12 we do.

13 MS. BONJEAN: I think we do.

14 THE COURT: Okay, good.

15 MS. BENSING: Your Honor, I just wanted to raise
16 one issue, which is the motions deadline.

17 THE COURT: I'm going to address that now.

18 So I had set today the expert disclosure deadline,
19 which would now be after the motions in limine deadline.

20 I'm going to push back the motions in limine deadline, and

21 also because new counsel just came in, I'm going to give a

22 brief extension. Motions in limine shall now be filed by

23 October 11th, at 5 p.m. Responses, if any, shall be filed

24 by October 18th, at 5 p.m. Replies are not permitted. If I

25 want more information, I will ask for it. All the other

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1 deadlines remain unchanged.

2 Now, I, of course, recognize that the 3500
3 material most likely will not be produced before, but I
4 think it sounds like there might be -- I guess maybe I
5 should ask you, what are your anticipated motions in limine?

6 MS. BONJEAN: We have quite a few, Your Honor, and
7 there are certainly motions in limine that we can get on
8 file by the October 11th deadline.

9 We reserve our right, of course, that if something
10 comes up in the 3500 material that we could not have
11 anticipated, to file a motion in limine.

12 THE COURT: I mean, I think that's sort of always
13 the case, that if material is produced for a particular
14 witness and there's really some issue with it, you know, you
15 take it up with the Court, right?

16 Does the Government want to weigh in on this?

17 MS. BENSING: No. I expect that with a case this
18 size, both parties may have motions that arise after the
19 motions in limine deadline, but the Government will do its
20 best to address everything it can.

21 THE COURT: Okay. I mean, the issue with 3500
22 material leading to motions is that the Government often
23 overproduces, right? And the Government has already said
24 they're not going to call certain witnesses for whom they
25 are going to produce material. So I think it's likely that

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1 maybe there will be some issues, but you won't know until we
2 get closer to trial what those issues are. I mean, I would
3 encourage the Government to really give thought about
4 whether you're calling certain witnesses or not, and to the
5 extent that you can share that with the defense so they can
6 focus their energies on the witnesses that will actually be
7 testifying.

8 MS. BONJEAN: Just to clarify, Judge, is the
9 October 4th deadline for expert disclosures staying?

10 THE COURT: Yes.

11 MS. BONJEAN: Okay. We will meet that deadline,
12 of course. The Government has revealed one expert that they
13 intend to call.

14 THE COURT: Right.

15 MS. BONJEAN: We do intend to bring probably
16 Daubert motions. I suppose the Government may choose to do
17 so as well.

18 To the extent that something comes up in the 3500
19 material that might trigger an expert, I hope that doesn't
20 take place, but I would ask the Government that if they
21 envision any scenario where 3500 material that will be
22 produced might give rise to a scenario where the defense
23 needs to call an expert witness, that they tell us sooner
24 rather than later.

25 THE COURT: You anticipate filing a Daubert motion

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1 on October 11th?

2 MS. BONJEAN: Well, I guess I would ask the Court
3 for guidance on that. Does the Court want Daubert motions
4 on October 11th?

5 THE COURT: I mean, the trial is in January.

6 MS. BONJEAN: Sure.

7 THE COURT: So yes, I think it's helpful to have
8 everything you know that you're going to be moving on, I
9 think we should do it then.

10 MS. BONJEAN: Sure.

11 THE COURT: Government, do you want to be heard on
12 this?

13 MS. BENSING: It's hard for us, Your Honor,
14 because we don't know who or how many experts that they
15 might be noticing. If we get something on October 4th and
16 we're unable to comply with the October 11th date, we'll
17 write to the Court pursuant to the Court's individual rules.

18 MS. BONJEAN: It's a little circular, Judge. I
19 mean, for instance, there's an issue with the journals;
20 their authenticity, whether they were fabricated, the timing
21 of them. That could give rise to a possible expert witness
22 on our part.

23 We will do our best. But the more information
24 that they can give us, the better off we will be to be able
25 to -- I mean, they want what we want. We all want

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1 information so that we can prepare our cases. It can't just
2 be a one-way street, although I don't think the Government
3 is saying that. But the more that they can disclose, the
4 more we will be able to respond.

5 THE COURT: That sounds reasonable.

6 Again, I've said this many times, I don't want
7 waves and waves and waves of motions, right? We need to
8 decide this, but I think you do need to have the information
9 that you're entitled to get.

10 MS. BENSING: Your Honor, just with respect to
11 motions, the Government wanted to preview to the Court,
12 we're mindful of the Court's individual rules as to number
13 and length of motions. We do expect to have kind of two
14 sets of motions. One, a motion seeking to admit other acts
15 evidence, and then kind of a separate set of motions in
16 limine dealing with various evidentiary issues.

17 THE COURT: Such as? Can you give me a general
18 category?

19 MS. BENSING: Oh, like, you know, a motion seeking
20 to preclude various arguments or seeking to admit things
21 pursuant to various co-conspirator statements, for example.
22 Things like that.

23 So we would propose filing those on the same day.
24 But just given the sort of type and length that we
25 anticipate that these might be, with the Court's permission,

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1 we'd like to file them as just kind of separate documents.
2 We could file them all together, but I anticipate it would
3 be a pretty lengthy document.

4 So whatever the Court's preference is, really.
5 Often the Government files these as sort of two separate
6 types of motions. But we wanted to raise that now.

7 THE COURT: I'm not sure I have a strong
8 preference.

9 Defense, do you want to be heard? I lean toward
10 one document, recognizing that you might want to ask for an
11 over-length document at that point.

12 MS. BONJEAN: Judge, we would defer to your
13 preference. I would anticipate that we will have to seek
14 leave for oversize based on our motions in limine and --

15 THE COURT: All right. Let's aim for one document
16 and you can, when you have a realistic sense of how many
17 pages you need, let me know, you can put in a request for
18 over-length, unless you want to ask for a certain page
19 length now. But I think you should spend some time figuring
20 out exactly what your motions are before you do that.

21 Anything else we need to take up?

22 MS. KASSNER: Not from the Government, Your Honor.

23 THE COURT: Okay. I'm not going to, other than
24 what we've already discussed and the deadlines I've set, I'm
25 not going to address or make any rulings on some of the

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1 other requests because I think they're a little bit
2 premature given that the parties really need to be talking
3 to each other, and again, listening to each other as well.
4 So I'm going to leave that to the parties to come back to me
5 if there are any outstanding requests that the Court needs
6 to address. But right now, I will be waiting to hear from
7 you, not vice versa.

8 So everyone knows where to find the Court if
9 there's a reason for us to come together sooner rather than
10 later. If not, we'll just adjourn for today and I'll look
11 out for submissions.

12 We've been here a while and I appreciate everyone's
13 patience, and maybe stay longer and speak to each other.

14 We're adjourned.

15 MS. BONJEAN: Thank you, Your Honor.

16 MS. KASSNER: Thank you, Your Honor.

17 (Matter adjourned.)

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CERTIFICATE OF REPORTER

22 I certify that the foregoing is a correct transcript of the
23 record of proceedings in the above-entitled matter.

24

/s/ Kristi Cruz

25

Kristi Cruz RMR, CRR, RPR
Official Court Reporter