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7
8 IN THE UNITED STATES DISTRICT COURT FOR THE
9 EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,
11
12 Plaintiff,

13 v.

14 FREDERICK SCOTT SALYER,
15
16 Defendant.

CASE NO: 2:10-CR-0061-LKK

**DEFENDANT'S OPPOSITION TO
GOVERNMENT'S MOTION FOR AN
ORDER SETTING A DEADLINE FOR
FILING OF REPLIES IN SUPPORT OF
SUPPRESSION MOTIONS**

Date: March 8, 2011
Time: 9:15 am

17
18 **INTRODUCTION**

19 The government prefers that the defendant reply to the government's motion
20 responses and have this Court hear them without the benefit of being able to access
21 the vast amount of discovery accumulated by the FBI over the period of almost five
22 years. Such is obviously the case since the government has steadfastly failed to
23 provide the discovery required under Rule 16 and Brady v. Maryland, and mandated
24 by Magistrate Judge Hollows' discovery order and challenged the defendant's
25 attempt to use private funds to mount the discovery in a useable and searchable
26 format.

27 The government's motion responses raised fact and document-intensive
28 arguments in opposition to Mr. Salyer's pending motions to suppress (not dependent

1 upon the standing and derivative taint arguments it now makes) yet now by a new
2 motion endeavors to deprive Mr. Salyer of the very evidence he needs to adequately
3 respond to those arguments, including to further support his request for a *Franks v.*
4 *Delaware* hearing. In its terse motion, the government also deliberately ignores the
5 fact, as previously reported to this Court, that the discovery it has thus far provided
6 to the defendant, and upon which it relies in opposition to the suppression motions,
7 is not yet complete and virtually inaccessible in its present form.

8 The government is well aware that the voluminous discovery is in a format that
9 is unusable by the defense and that Mr. Salyer has been relegated to the time-
10 consuming task of combing through the discovery, including thousands of emails,
11 without the ability to search across the materials by computer.

12 This Court recently granted the defendant permission to seek the transfer of
13 funds on deposit in Andorra so that the trustee of his childrens' trusts could
14 undertake the burden of paying for him to access the funds (Dkt. No. 270). Counsel
15 for the defendant immediately transmitted the order to counsel in Andorra with
16 instructions to have it translated, certified as required by the laws of that country and
17 given instructions to present the order to the Court in Andorra as a predicate to
18 obtaining release of the funds.¹

19 The government could solve this problem and move the case along but
20 refuses to do so. Instead it has continued to nip at the defense's heels by making
21 motion after motion, none of which is intended to secure the goal of a fair trial. At
22 the same time, now a year after the charges were filed and despite having been
23

24
25 ¹ The trustee for the childrens' trusts will likely have to seek additional relief from
26 this Court and moving papers are being prepared for that purpose since, even though
27 possessed of a copy of the application and this Court's order, and that the funds
28 belonged to the trusts, the Bank of the West, sought and received appointment of a
receiver by a JAMS referee to attach the funds once they arrive in the United States.
This is so even though the trusts are not parties in that case. (Monterey County
Superior Court, *Bank of the West v. Scott Salyer*, Case No. M100232, February 11,
2011).

1 ordered by Magistrate Judge Hollows to do so in August 2010, the government has
2 not turned over a single document, tape or email designated as falling within it's
3 Brady disclosure requirement.

4 Finally, the government intentionally oversimplifies the serious of the
5 discovery issue as it relates to the defendant's ability to reply to the suppression
6 motions by incorrectly alleging that the discovery was needed only to deal with
7 standing to challenge warrantless searches at his business. The government's
8 position is inaccurate, and has always been so, because as seen below discovery is
9 needed to fully litigate the motions.

10 ARGUMENT

11 **A. The Pending Motions To Suppress Are Not Wholly Dependent On** 12 **The Court's Ruling On Standing With Respect To The Warrantless** 13 **Search Motion Or The Doctrine Of Derivative Taint As Posited By** 14 **The Government.**

15 Two critical issues intersect here: The defendant's Fourth Amendment right to
16 be free from illegal searches and seizures and his concomitant due process right to
17 discovery. The defendant has challenged the government's searches of his
18 personal residence, his personal executive office and his family business by search
19 warrants and the government's Title III wiretap applications. Motion to Suppress
20 Evidence Obtained by Search Warrants Tainted by Prior Illegal Warrantless
21 Searches and Title III Wire Interceptions, Dkt. Nos. 151, 152; Motion to Suppress
22 Fruits of Illegal Wiretaps or, in the Alternative, for Suppression Under *Franks v.*
23 *Delaware*, Dkt. Nos. 154, 156.)²

24 Those challenges, which request a hearing under *Franks v. Delaware*, are
25 based on:

26 (1) the lack of probable cause for the search warrants which was not only the

27 ² He has also challenged on Fourth Amendment grounds, and under *Franks v.*
28 *Delaware*, the government's search of his Google email account. (Motion to Suppress
Evidence Obtained from Google Email Account, Dkt. Nos. 157, 158, 159).

1 product of the warrantless searches conducted by the government's informant,
2 Manuel, but also the result of: (a) Manuel's unreliable statements and actions as an
3 informant; (b) the affiant agent's misconduct in applying for and managing Title III
4 wire interceptions; and, (c) the agent's material misrepresentations and omissions of
5 facts in the affidavits for the search warrants and Title III wire interceptions which
6 were critical to a probable cause determination; and,

7 (2) the affiant agent's failure to truthfully and fully inform the Court in
8 connection with the necessity allegations in the Title III wire applications that: (a) his
9 informant, Manuel, had actually gained access to and retrieved a myriad of
10 documents and even product samples without a warrant, (b) had actually recorded
11 conversations and which made the wire interceptions unnecessary and had the
12 capability of recording consensual conversations with the key targets of the
13 investigation; and, (c) had a second, undisclosed informant who was able to and did
14 regularly converse with the targets of the investigation.

15 The government has responded by claiming Mr. Salyer lacks standing to
16 object to the warrantless searches of his businesses but has essentially admitted
17 that the informant had access to virtually all of the business' records. (Oppositions at
18 Dkt. No. **189?** and 269. This Court's order denying the Motion to Suppress
19 Evidence of Warrantless Searches finding the defendant lacks standing relative to
20 the warrantless searches (Dkt. No. 273) does not address or dispose of these other
21 issues.

22 The government's substantive arguments and oppositions to the pending
23 motions to suppress are fact and document intensive. Whether or not Mr. Salyer
24 has standing to challenge the warrantless searches occurring at his family-owned
25 business and the derivative taint to the search warrants and Title III applications
26 does not dispose of the pending suppression motions and the fact-driven *Franks v.*
27 *Delaware* issues. Perhaps the best example of which is that a full review of the
28 company documents is necessary if only to demonstrate that the Title III warrants

1 were not necessary. For that, the defendant has independent statutory standing as
2 a participant in the intercepted calls. *United States v. Alderman*, 394 U.S. 165,
3 176-78 (1969) (a party to the intercepted conversation has standing to seek
4 suppression of a Title III wiretap); see also *United States v. King*, 478 F.2d 494, 506
5 (9th Cir. 1973).

6 Similarly, he has standing to challenge the search of his personal business
7 premises and his residence because the same affidavit used to support the search
8 of the business premises was used to obtain a search warrant for Mr. Salyer's
9 residence and his personal offices. Standing for his personal residence is undisputed
10 and as to his personal executive office space, standing is evident under *United States v.*
11 *SDI Future Health, Inc.*, 568 F.3d 684, 698 (9th Cir. 2009). The attendant proffered
12 bases for a *Franks v. Delaware* hearing also remain as to the residence and the
13 personal office space and, as was noted in the motions themselves, the entirety of
14 the search warrant affidavit is at issue because a master warrant affidavit was used
15 for the home, personal executive offices and the production facilities.

16 **B. The Government's Refusal To Provide Discovery In A Format**
17 **Accessible To The Defendant Militates Against The Expedited**
18 **Briefing Schedule The Government Now Seeks.**

19 The government's respective oppositions to the suppression motions,
20 including its opposition to Mr. Salyer's requested *Franks v. Delaware* hearing, rely
21 intrinsically on the very kind of electronic discovery it has yet to fully provide to Mr.
22 Salyer. *To wit*, e-mails among SK Foods employees and internal business
23 documents and memoranda are alleged by the government to demonstrate the
24 informant's reliability to support the probable cause to search. The government has
25 used its superior access to mine those documents for support. Those same
26 documents and records show the scope of the government informant's access to
27 information and undercuts the government's claimed of necessity for the wiretap
28 applications.

1 For example, in its Response to Motion to Suppress Evidence Obtained by
2 Search Warrants and for *Franks* Hearing (Dkt. No. 195) the government states that
3 “[t]he evidence establishing probable cause for Fraudulent Product Labeling was
4 derived from information provided by Manuel based on his knowledge of the industry
5 and SK Foods,” that “Manuel provided documents including emails related to the
6 purchase of high mold paste from Ingomar Packing Company; inventory records; a
7 label from an Ingomar bin that contained high mold paste; five tomato paste sample
8 bags; lab result registers, and a picture of a bin with metal shavings and SK Foods
9 Return Reports,...” In other words, to counter Mr. Salyer’s request for a *Franks v.*
10 *Delaware* hearing, the government relies on the full panoply of SK Foods e-mails
11 and internal corporate documents and production records to corroborate Manuel’s
12 reliability as an informant and to support its claimed truthfulness of statements
13 reported by the agent in the search warrant affidavits and Title III applications
14 concerning Manuel’s conduct and access (or purported lack of access) to alleged
15 inculpatory materials.

16 The government thus has enjoyed full and complete access to and use of the
17 immense repository of business documents, which Mr. Salyer cannot use to support
18 his motions or defend himself. To date, the government has provided to the defense
19 25 of the 33 hard drives it required the defense to purchase and on which it
20 promised to copy data in a usable format; the most recent hard drive was returned
21 only on **February 9, 2011**. In addition to the sheer volume of documents, the form in
22 which the government has produced the data has exacerbated the defendant’s
23 inability to access them: forensic images that require a special program to simply
24 "unpack" them and view individual files. Even after the data is unpacked, additional
25 processing is required to harvest the data into a form that can then be loaded into a
26 traditional database to enable the defense to search and review the data. As
27 previously reported to the Court, experts have informed counsel that the cost of
28 doing so will exceed \$250,000. The government's refusal to provide the discovery in

1 a format where it is readily usable and searchable (as it has been for them for
2 several years) has deprived Mr. Salyer of meaningful access to the voluminous
3 electronic discovery and has diminished his ability to reply to the suppression
4 motions. Without that access, the Court will have before it the documents the
5 defense has thus far been able to uncover, because they were mostly attached to
6 Agent Artley's reports, and the electronic discovery the government selectively
7 chooses to rely upon.

8 Similarly, the defendant's *Franks v. Delaware* motions, to obtain a hearing,
9 require: (1) a substantial showing that "the affidavit contains intentionally or
10 recklessly false statements, and (2) the affidavit purged of its falsities would not be
11 sufficient to support a finding of probable cause." *United States v. Gonzalez, Inc.*,
12 412 F.3d 1102, 1110 (9th Cir. 2005). Here, virtually every paragraph of the search
13 warrant affidavits and the wiretap affidavits depend on Manuel's reliability and
14 credibility as an informant, which in turn, are in substantial part based on the
15 information passed from Manuel to Agent Artley, including e-mails and internal SK
16 Foods company records. Here the defendant has made such a showing but wishes
17 to perfect it by recourse to the rest of the discovery and also desires to prepare for
18 the inevitable evidentiary hearing. The discovery is needed for both and the
19 government's efforts to stymie the discovery access in favor of an "expedited"
20 schedule works in its favor but not in the interests of a final and fair determination of
21 the issues.

22 Finally, the discovery and the documents still unavailable to the defendant
23 take on even greater importance because unlike in most cases, here the government
24 has intentionally and very tellingly declined to provide affidavits from either Tony Manuel or
25 Agent Paul Artley to controvert the assertions made by the defense in the suppression
26 motions.

27 CONCLUSION

28 Rather than provide the discovery and *Brady* disclosures required by the

1 defense to prepare his case and to reply to the pending motions, the government
2 instead argues that the defense should be forced to go forward at a pace it believes
3 gives it the best chance for success. Without meaningful access to the fundamental
4 records necessary to refute the government's arguments in opposition, and under
5 circumstances where the government controls all of the key witnesses on the search
6 issues before the Court by plea and immunity agreements, the defendant should not
7 be required to go forward with his motions until the government has fully satisfied its
8 Rule 16 discovery and *Brady* obligations and the defendant has been given a
9 reasonable opportunity and the financial tools necessary to make use of the
10 materials.

11 Respectfully submitted,

12 Dated: February 18, 2010

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