U.S. Department of Justice

United States Attorney
Eastern District of New York

KCB/GK/DEL/SMF/NG
F. #2018R01401

271 Cadman Plaza East
Brooklyn, New York 11201

December 17, 2024

By ECF and Email

The Honorable Diane Gujarati
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Cherwitz, et al.
Criminal Docket No. 23-146 (DG)

Dear Judge Gujarati:

The government respectfully submits this letter in response to defendants Rachel Cherwitz and Nicole Daedone's December 12, 2024 motion ("Def. Mot."), requesting that the Court order the broad disclosure by the government of "all materials relating to" a special agent with the Federal Bureau of Investigation ("FBI") that are "relevant to the [above-captioned] case in any way." ECF Dkt. No. 227. The defendants claim, without support from any relevant legal authority, that they are entitled to such information because it could "shed light on the integrity of the investigation." Id. at 5. The defendants additionally request an evidentiary hearing, "should one become necessary" to "inquire as to the nature of [the special agent's] conduct." Id. at 6. The Court should deny the defendants' motion in its entirety.

In support of their motion, the defendants rely on a series of speculative and unfounded allegations against an FBI special agent who participated in the investigation of this case that have already been raised—and in large part, squarely rejected by this Court—in prior motions. Specifically, as to the defendants' claim of misconduct as to any purportedly privileged documents, the Court has already rejected that claim on its merits, determining that "any purported privilege . . . belongs to OneTaste, the corporation, not to the defendants individually," and determining that, "[a]s is clear from the record before the Court, the Government neither buried nor concealed the nature of the Purportedly Privileged Document." Sept. 27, 2024 Tr. 19, 23. As to the defendants' claim of misconduct surrounding the deletion of an email account, the Court has already determined that "[n]otwithstanding anyone's characterizations of the communications, it is clear to the Court on the record before it that the agent did not direct the individual at issue to destroy her emails." Id. at 26; see also id. at 27 (observing that the defendants "have failed to demonstrate that [a witness's email account] possessed exculpatory value that was apparent before the account was canceled" or "bad faith on the part of the

government"). As to the defendants' claims that the government has colluded with the media or otherwise improperly relied on media reports concerning OneTaste, or that the government has improperly used the term "victim" when speaking with witnesses, as the government argued in its motions in limine, courts have consistently held—and often give jury instructions reflecting—that arguments regarding the government's decisions during an investigation and its motives and timing in bringing charges are irrelevant, unduly prejudicial and improperly invite jury nullification. See Gov't Mots., ECF No. 169, at 56 (citing cases). Indeed, the Court has already determined that "[t]he Court will not permit anything along the lines of a claim that the Government colluded with the media in bringing this case" because such issue is irrelevant to the defendants' guilt. Nov. 15, 2024 Tr. 83.[1]

Indeed, the only new purported "misconduct" that defendants cite is an assertion that the special agent communicated with a government witness using a personal email account, which is false. Def. Mot. 2, 5. The special agent did not "communicate" with a government witness using a personal email account; rather, as already produced to the defendants pursuant to 18 U.S.C. § 3500, the special agent received two emails containing links to typewritten journals associated with a government witness through a Google link sent to a gmail address. The gmail address was used by the special agent in his official capacity to receive materials shared with the FBI via Google drive, which are otherwise inaccessible through government email addresses. Had the defense taken up the government on its repeated offers to meet and confer on discovery issues, the government would have explained that the gmail account used by the special agent to access the referenced materials was created for his official use at the FBI. Likewise, the defendants' assertion that they were "just informed" that "journal files" were "deleted" at the "behest" of a special agent is groundless; the government neither informed anyone that any such deletion at the direction of the FBI had happened, nor is it true.[2]

The government has made extensive disclosures of material in this case pursuant to Rule 16, the Jencks Act, 18 U.S.C. § 3500, and Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, and will continue to do so on a rolling basis. Indeed, such productions have included, and will continue to include communications between FBI special agents and government witnesses. The government has also indicated repeatedly its willingness to meet and confer with the defense on relevant issues. The defendants have cited to no authority entitling them to the blanket disclosure of any and all materials "relevant to" a special agent who participated in the investigation; and the government is not aware of any. Def. Mot. 1. Nor have the defendants provided any basis, or legal authority for, an evidentiary hearing regarding the

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[1] Indeed, the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771, explicitly provides that victims of crimes, among other things, have the "right to be informed of the rights under the [Act]" and the services available to them. 18 U.S.C. § 3771(a)(10). Notifying victims of their rights is a statutorily imposed obligation and not any indication of misconduct by the government. The Court should preclude any cross examination by the defense that suggests otherwise.

[2] The defendants also insinuate that the government's indication that it will not seek to call the special agent to testify at trial is in some way nefarious, when in fact, it is commonplace — and irrelevant.

same. And finally, insofar as the defendants seek to call a special agent to testify at trial, they must proffer some kind of relevant, admissible testimony by the agent, and may not "permissibly . . . call[] [the special agent] as a hostile witness for the sole purpose of impeaching him." United States v. Shandorf, 20 F. App'x 50, 53 (2d Cir. 2001).

Accordingly, the Court should deny the defendants' motion in its entirety.

Respectfully submitted,

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